(1)

No. 95-6510-CFH
Status: GRANTED
CAPITAL CASE

Title: Coleman Wayne Gray, Petitioner
v.
J. D. Netherland, Warden

Docketed:
October 25, 1995

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Turner,Paul G., Olive,Mark E.

Counsel for respondent: McLees Jr.,John H.

Entry	Date	Note	Proceedings and Orders
1	Oct 23 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 24, 1995)
3	Nov 22 1995		Brief of respondent Netherland, Warden in opposition filed.
5	Dec 1 1995		Reply brief of petitioner Coleman W. Gray filed.
4	Dec 6 1995	C	Application (A95-492) for a stay of execution pending the disposition of a petition for a writ of ceritorari, submitted to The Chief Justice.
6	Dec 8 1995		Response to application (A95-492) filed by respondent, Netherland, Warden.
7	Dec 12 1995		Application (A95-492) referred to the Court by the Chief Justice.
8	Dec 13 1995		(A95-492) Application granted pending the disposition by this Court of the petition for a writ of certiorari.
9	Dec 14 1995		DISTRIBUTED. January 5, 1996 (Page 34)
11	Jan 5 1996		Petition GRANTED. limited to Questions 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 15, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
12	Feb 15 1996		Joint appendix filed.
14	Feb 15 1996		*Jt. Appendix in two volumes
13	Feb 16 1996		Brief of petitioner Coleman W. Gray filed.
15	Feb 16 1996		SET FOR ARGUMENT MONDAY, APRIL 15, 1996 (3RD CASE).
16	Mar 11 1996	G	Motion of petitioner for appointment of counsel filed.
17	Mar 13 1996		Brief amicus curiae of Criminal Justice Legal Foundation filed.
18	Mar 14 1996		Brief of respondent J.D. Netherland, Warden filed.
19	Mar 15 1996		CIRCULATED.
20	Mar 18 1996		Motion for appointment of counsel GRANTED and it is ordered that Mark E. Olive, Esquire, of Richmond, Virginia, is appointed to serve as counsel for the petitioner in this case.
21	Mar 20 1996		Record filed.
		*	Org. record USCA-Fourth Circuit, USDC-Eastern District/VA, State Court proceedings (2 Sealed Envelopes)(3 BOXES)
22	Apr 8 1996	X	Reply brief of petitioner Coleman Wayne Gray filed.

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No. 95-6510-CFH

Entry	Date	Note	Proceedings and Orders
23	Apr 15 1996		ARGUED.

EDITOR'S NOTE

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95-6510 (2)

No._____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ORIGINAL

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Hoppe
(4)

CAPITAL CASE: Execution Date Scheduled December 14, 1995

QUESTIONS PRESENTED

1. Whether the "new rule" doctrine bars federal habeas corpus relief where a federal district court vacates a death sentence by applying fundamental principles of due process recognized by this Court in Gardner v. Florida, 430 U.S. 349 (1977), and prior decisions to conclude that the petitioner's death sentence was unreliable and obtained unconstitutionally through the prosecutor's tactics of ambush and failure to disclose material exculpatory evidence?

2. When in order to prove that the defendant poses a danger in the future the state introduces evidence at capital sentencing purportedly connecting the defendant to a notorious double homicide, is the prosecutor required, under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including Kyles v. Whitley, 115 S. Ct. 1555 (1995), to disclose evidence tending to prove that another person actually committed the double homicide?

3. Whether the limiting instructions given by the trial judge to the jury were sufficient to cure the facially unconstitutional "vileness" aggravating circumstance submitted to the jury as a basis upon which it could sentence the petitioner to death?

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Coleman Wayne Gray, a Virginia inmate under sentence of death, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a writ of habeas corpus granted him by the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995) and appears in Appendix A to this Petition. The opinion of the District Court for the Eastern District of Virginia is unreported, and it appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals opinion in this matter was filed on June 28, 1995. A timely Petition for Rehearing was filed on July 12, 1995. The Court of Appeals' denial of the Petition for Rehearing was issued on July 25, 1995 and is set forth in Appendix C. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments VIII and XIV to the United States Constitution, and Virginia Code § 19.2-264.2, are set forth in Appendix D.

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted of capital murder and sentenced to death by the Circuit Court of the City of Suffolk, Virginia in 1985. The United States District Court for the Eastern District of Virginia granted its writ of habeas corpus and vacated Gray's death sentence because it found that the prosecutor ambushed Gray by introducing at the sentencing phase of his trial unreliable evidence suggesting that Gray had committed a highly-publicized double homicide for which he never has been indicted or convicted, employing "tactics violat[ing] the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The United States Court of Appeals for the Fourth Circuit reversed the District Court without reaching the merits of Gray's claim, instead holding that Gray impermissibly sought the benefit of a new rule of criminal procedure on collateral review. Gray seeks review in this Court of that holding and other holdings of the Fourth Circuit.

A) The Guilt Phase Of Gray's Trial

Melvin Tucker and Coleman Gray were arrested and indicted for the capital murder of Richard McClelland. On May 2, 1985, Mr. McClelland, the manager of a Murphy's Mart store in Portsmouth, Virginia, was abducted from his car after leaving work, robbed, and shot to death in the City of Suffolk.

Virginia. Judge Godwin, the Suffolk Senior Circuit Court Judge, appointed Mr. James Moore and Mr. Ward Eason to represent Gray.

Mr. Moore and Mr. Eason were appointed in May, 1985. (A. 978-9).[1] On June 27, 1985 and on November 7, 1985, trial counsel moved the trial court either to pay for or to appoint an investigator to help them fully and adequately prepare Gray's defense. (A. 798-800, 1063-8). Those motions were denied. Id.

In November, 1985, trial counsel filed a pre-trial discovery motion, seeking the disclosure of all exculpatory evidence. (A. 790-92). Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murder. (A. 937). The Commonwealth's Attorney disclosed no evidence concerning the penalty phase of the trial.

Under Virginia law, only the triggerman may be convicted of capital murder and sentenced to death. Va. Code § 18.2-18. Consequently, the most critical factual issue in the McClelland murder trial probably was the identity of the triggerman. There was no physical evidence to prove whether Tucker or Gray shot and killed Mr. McClelland, and each man claimed that the other had committed the murder. (A. 937).

Before Gray's trial, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. In exchange for Tucker's testimony against Gray, the Commonwealth agreed to try Gray on a capital murder charge, and to prosecute Tucker only for first degree murder. (A. 937-8). Gray's capital murder trial began on December 2, 1985. This was Commonwealth's Attorney Ferguson's first capital murder trial. (A. 938). At the beginning of the trial, one of Gray's attorneys asked the trial court to order the Commonwealth's Attorney to reveal the evidence he would introduce at the penalty phase if

[1]Record citations refer to the Joint Appendix that the parties filed in the United States Court of Appeals for the Fourth Circuit. Pursuant to Supreme Court Rule 14.1(i), specified record references are included as Appendix E to this Petition.

Gray was found guilty. Counsel based this request on a Virginia Supreme Court case which established that the fair and preferred practice in capital murder trials is for the prosecution to reveal the evidence to be presented at the penalty phase prior to the trial. See Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526, cert. denied, 464 U.S. 865 (1983).

Ferguson represented to the court and to defense counsel that he intended to introduce evidence of statements Gray allegedly had made about other crimes he had committed. The following conversation occurred:

> Mr. Moore: Your honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument ... If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.
>
> Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record ... **The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.** ...
>
> Mr. Moore: **Is it going to be evidence or just his statement?**
>
> Mr. Ferguson: **Statements that your client made.**
>
> Mr. Moore: **Nothing other than statements?**
>
> Mr. Ferguson: **To other people, that's correct. Statements made by your client that he did these things.**

(A. 938-9). Ferguson did not disclose the context of the statements or to whom Gray allegedly had made these statements.

The Sorrell murders were one of the most notorious crimes in the history of the Tidewater,

Virginia area. In December, 1984, Lisa Sorrell and her three-year-old daughter Shanta were abducted from Greenbriar Mall in Chesapeake, Virginia. Five days later, after an intensive, well-publicized search, their abandoned bodies were found. Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. She had been shot in the head six times by a .32 caliber gun. Shanta's body was found in the trunk of her mother's car. She apparently had died of carbon monoxide inhalation. (A. 939-40).

Melvin Tucker, who had a previous conviction for armed robbery, testified at trial on behalf of the Commonwealth pursuant to his plea agreement. Under the terms of this agreement, the Commonwealth agreed to try him "on a charge of first degree murder rather than capital murder," and "to convey to the Court [trying him on first degree murder charges] the nature and extent of [his] cooperation at the time of his sentencing." (A. 1684-87).

Tucker had given multiple statements to the police concerning the crime. In these statements, Tucker's story varied, except he always maintained that Gray was the triggerman. At trial, Tucker testified that Gray led in the planning of the robbery of the Murphy's Mart and the subsequent abduction of McClelland, that he (Tucker) never touched the murder weapon, and that Gray had possession of the gun during the entire time of the crimes. Tucker testified further that Gray was the "triggerman," and that Gray had burned McClelland's vehicle afterward. (A. 1688-1718). Tucker also testified that, sometime after the murder, he took Gray to the Nansemond Treatment Plant, where Tucker was employed. According to Tucker, Gray threw the murder weapon into one of the contact tanks at the treatment plant. (A. 1729-31).

In addition to Tucker's testimony, the Commonwealth relied upon three jailhouse snitches who testified that Gray had confessed to killing Mr. McClelland. Inmate Sylvester "Jake" Joyner testified that Gray admitted to binding, gagging, and shooting Mr. McClelland. Inmate Jeremiah Smallwood testified that Gray confessed to binding Mr. McClelland's hands and shooting him. Mr. McClelland had not been

bound and gagged, but television and newspaper accounts reported that he was. (A. 1289-91, 1803-4, 1925-28). Larabee Ferrell, another inmate at Chesapeake City Jail, testified that he heard Gray admit to inmate Carl Bond that he was the "triggerman" in the McClelland murder. (A. 1908-14). Bond, a former deputy sheriff, testified at trial that he was incarcerated in the Chesapeake City Jail at the same time as Gray, but that Gray always maintained that Tucker was the "triggerman" in the McClelland murder. (A. 1971). Although the Commonwealth was aware that Bond's testimony contradicted Ferrell, it never informed Gray's counsel of this exculpatory evidence. (A. 1978-81). The Commonwealth presented no other evidence to prove that Gray was the "triggerman." It relied completely upon the testimony of Tucker, Joyner, Smallwood, and Ferrell to prove this essential element.

On December 5, 1985, Gray's jury retired to deliberate, after receiving all of the evidence concerning the McClelland murder, and after being instructed by the trial judge. That same day, the jury returned verdicts of guilty against Gray on all counts. Gray's punishments on the robbery charge and the abduction charge were set at life imprisonment. His punishment on the arson charge was ten years, and he was given four years on each of the firearm charges. (A. 940).

B) The Penalty Phase

The next morning, the penalty phase of Gray's capital murder trial began. Before trial, the attorneys met in the trial judge's chambers. Gray's counsel told the court that the previous evening, Ferguson had disclosed for the first time that he intended to introduce not only statements Gray allegedly had made about the Sorrell murders, but also graphic testimonial and photographic evidence about the crimes. Despite Ferguson's previous unequivocal pledge to introduce only statements, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) testimony of Detective Michael Slezak, the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) testimony of the medical examiner who investigated the causes of death and the nature and extent of the Sorrells'

injuries. (A. 940-1).

Gray's trial counsel told the court that they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut the statements allegedly made by Gray to fellow inmates. Despite counsel's plea for additional time to prepare, the trial court permitted Ferguson to introduce extensive evidence about the Sorrell murders. First, the Commonwealth called Gray's accomplice Melvin Tucker to testify. Tucker had escaped prosecution for capital murder in the McClelland matter in exchange for his testimony against Gray. Tucker testified that, in May 1985, while he and Gray were looking for newspaper articles about the McClelland murder, Gray allegedly pointed to an article with the picture of the Sorrells. Gray then allegedly admitted that he had "knocked off" Lisa Sorrell.[2] (A. 941).

Based solely upon Tucker's testimony, the trial court allowed Commonwealth's Attorney Ferguson to introduce all of the evidence gathered by the Chesapeake Police Department regarding the Sorrell murders. First, the Commonwealth called Detective Slezak, the Chesapeake police officer who investigated the Sorrell murders. The ostensible purpose of Slezak's testimony was to demonstrate that the Sorrell murders actually had occurred, and he did this by identifying various graphic photographs of the burned automobile and the murder victims. These photographs were admitted into evidence. (A. 941).

Next, Dr. Faruk Presswalla, the state medical examiner who performed the Sorrell autopsies, testified concerning the victims' causes of death. Presswalla displayed the autopsy photos of Lisa and Shanta Sorrell to the jury, and he described the violent causes of their deaths. (A. 2136-44).

As they had predicted to the trial court, Gray's trial attorneys were unable to effectively cross-examine these witnesses. Trial counsel were prepared only to challenge the evidence Ferguson indicated

[2]The Sorrell murders had occurred on December 4, 1984, nearly six months before the McClelland murder. No such newspaper article, from the time of the McClelland crime, with pictures of the Sorrells, has ever been introduced into evidence. (A. 941).

he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the Sorrell murders. (A. 944).

After the Commonwealth rested, Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, Gray denied being the triggerman, and he blamed the killing on Tucker. He also flatly denied any involvement in the Sorrell murders. Gray also called seven witnesses who presented mitigating testimony in his behalf. (A. 944).

During penalty phase closing arguments, Ferguson used the Sorrell evidence extensively in his efforts to convince the jury to sentence Gray to death as a future danger to society. He reviewed at length the testimony of Detective Slezak and the medical examiner, describing again for the jury the crime scene and the causes of death of the Sorrells, and he argued that these murders plainly demonstrated that Gray posed a future danger to society. (A. 2243-5, 2250-2).

During rebuttal argument, Ferguson asked the jury:

> [D]id he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?
>
> Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

(A. 2263).

Gray's jury was instructed to consider whether the Commonwealth had proven either or both of the "future dangerousness" and "vileness" aggravators. The jury received no instruction concerning the way in which it should consider the Sorrell evidence. Concerning their duty to determine whether the Commonwealth had proven beyond a reasonable doubt that the murder was "outrageously or wantonly vile, horrible, or inhumane [sic] in that it involved torture, depravity of mind or aggravated battery to the victim," the jury received the following additional instructions based upon the Virginia Supreme Court's decision in Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied 441 U.S. 967 (1979):

> Depravity of mind is a degree of moral turpitude and physical [sic] debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.
>
> Aggravated battery is a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder.

(A. 2233-5). By using the word physical instead of psychical, the trial court misstated the Smith standard. The trial court did not define torture, moral turpitude, psychical, debasement, ordinary legal malice, or premeditation.

After deliberating for one hour and ten minutes, the jury unanimously fixed Gray's punishment at death. The jury found both that Gray posed a future danger to society, and that his conduct in committing the offense was vile "in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (A. 2265-8).

C) The Federal Evidentiary Hearing

On April 21, 1994, the United States District Court for the Eastern District of Virginia, Richmond Division, convened an evidentiary hearing in connection with Gray's federal habeas corpus petition filed under 28 U.S.C. § 2254. In this petition, Gray had raised a claim asserting that the Commonwealth's use of the Sorrell evidence violated his due process rights. The stated purpose of the evidentiary hearing was to determine whether Gray's attorneys were given ample notice of the evidence to be presented against him concerning the Sorrell murders, whether they were given a fair opportunity for cross-examination concerning the Sorrell murder issues, and whether the prosecution failed to turn over exculpatory information tending to prove that another person killed Lisa and Shanta Sorrell. (A. 265).

The District Court made the following findings of fact. Detective Slezak knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. (A. 940). Detective Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a long period of time. At the evidentiary hearing in the District Court,

Slezak testified that Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders, ignored Lisa Sorrell's parents when they saw him at the mall, made suspicious comments after he was notified that his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Timothy Sorrell also visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. During their investigation, the police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed. (A. 942).

Slezak's investigation revealed Timothy Sorrell's motive to murder his wife and child. Two weeks prior to the crime, a life insurance policy had been issued for the Sorrells. Timothy and Shanta were named as Lisa Sorrell's beneficiaries. Six days before Coleman Gray's trial began, Lisa Sorrell's parents, the Nixons, filed a pleading in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. (A. 942). This pleading asserted that Sorrell currently was under police investigation for the murders, and that it was anticipated that he soon would be indicted. (A. 719).

The District Court received testimony from Alfred Brown, a private investigator hired by Gray. The Nixons told Brown that one week prior to their daughter Lisa's death, a man possessing stolen merchandise came to the Sorrells' home. The Nixons and Detective Slezak suspected that Lisa was very upset about her husband's apparent involvement in a major criminal theft ring at the naval exchange where he was employed. Based upon all this information, Detective Slezak consulted Robert Kowalsky, the Chesapeake Commonwealth's Attorney, and asked him to determine whether Timothy Sorrell should be prosecuted for the murders of his wife and child. (A. 542-3, 942-3).

In July of 1985, Detective Slezak interviewed Coleman Gray. Slezak lied to Gray, and told him that Timothy Sorrell was going to be tried for the murder of his wife and daughter. Slezak asked for Gray's assistance. He told Gray there was evidence that would implicate Gray in the murder, and he

needed Gray to provide an explanation. Gray denied any involvement. Without being under any compulsion to cooperate, he agreed to provide fingerprint samples. (A. 944). Slezak then lied to Gray again. He told him that one of Gray's fingerprints matched a fingerprint found at the Sorrell murder scene. Gray's insistence that he did not commit the crime did not waver. Id.

Commonwealth's Attorney Ferguson never disclosed any of this information to defense counsel, even though it tended to prove that Gray was not involved in the Sorrell murders. In fact, during the federal evidentiary hearing Ferguson testified that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." The District Court later found that this "assertion is patently absurd." (A. 943).

Indeed, during the federal evidentiary hearing the Commonwealth intended to "establish[] that Mr. Gray did in fact commit the Sorrell murders," even though the District Court already had explained that the fact of Gray's guilt or innocence was not relevant to a determination whether his due process rights had been violated. (A. 268). The Commonwealth's evidence consisted almost exclusively of Detective Slezak's testimony concerning an attempt to verify his theory that Coleman Gray and his wife Melinda Gray committed the Sorrell murders during her dinner break.

On that day, Ms. Gray had a dinner break from her job at Murphy's Mart from 4:29 to 5:30 p.m. To investigate whether Gray could pick up his wife, drive to the Greenbriar Mall, abduct and kill the Sorrells, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the mall and Murphy's Mart. At 3:00 p.m., it took him about twenty-three minutes to travel one way between the locations. Detective Slezak did not drive the routes between the mall and scene of the crime or between the scene of the crime and Murphy's Mart. (A. 943).

Investigator Brown testified that he drove the same route driven by Detective Slezak, but he did it between the rush hours of 4:00 p.m. and 6:00 p.m., approximating the time the murders were committed. It took Brown over forty-three minutes to drive this leg. It took him another twenty-five

minutes to drive from Greenbriar Mall to the place where the bodies were discovered, and another fifteen minutes to drive from that scene to Murphy's Mart. His round trip took one hour and twenty-three minutes. The testimonies of Detective Slezak and Investigator Brown led the federal district court to conclude that "it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated." (A. 943).

To date, no one ever has been charged with or tried for the Sorrell murders.

D) The District Court's Opinion

At the conclusion of the evidentiary hearing, the District Court took this matter under advisement. On August 25, 1994, the Court filed an opinion and order issuing its writ of habeas corpus and vacating Gray's death sentence. The District Court made findings of fact that there was an abundance of evidence demonstrating that Gray was not involved in the Sorrell murders, and found that the prosecutor's testimony that, to his knowledge, there was then and is now no evidence that anyone but Gray committed the Sorrell murders to be "patently absurd." (A. 943).

The District Court grounded its decision to grant relief squarely upon fundamental principles of:

> due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase. [The prosecutor's] decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

(A. 945-6).

Specifically, the District Court based its holding upon the fact that the Due Process Clause does not allow the execution of a person on the basis of information which he has had no opportunity to explain or deny. The District Court reached this conclusion based upon this Court's holdings in Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994), Gardner v. Florida, 430 U.S. 349, 362 (1977), In re Oliver, 333 U.S. 257, 273 (1948), and Baldwin v. Hale, 68 U.S. 223, 233 (1863). The District Court

explained further that the essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing, and that when a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. (A. 946-7).

Based upon these basic principles of due process of law, the District Court concluded that the constitutional defect in Gray's penalty phase hearing -- that he was confronted and surprised by the evidence presented by the prosecutor after a promise not to present this kind of evidence -- violated Gray's right to fair notice and rendered the hearing clearly unreliable:

> The consequences of this surprise could not have been more devastating. ... [T]he Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries-no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed on Gray cannot stand.

(A. 948-9).

The District Court also held that, in addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed Gray's right to be sentenced based upon constitutionally reliable evidence. The District Court based this ruling upon this Court's decisions in United States v. Tucker, 404 U.S. 443, 447 (1972) and Townsend v. Burke, 334 U.S. 736, 741 (1948), and upon the Eleventh Circuit's decision in Richardson v. Johnson, 864 F.2d 1536 (11th Cir.) cert. denied, 490 U.S. 1114 (1989). Again, the District Court also relied upon this Court's opinion in Gardner, because the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or the materiality of the information necessarily reduced the reliability of the evidence presented. (A. 949).

> Specifically, with respect to the reliability of the evidence, the District Court explained that:
>
> The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. ... Because neither the defense attorneys, the Court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

(A. 949-50). For all of these reasons, the Court found that the prosecutor's tactics violated the moral standards of fair play embodied in the Due Process Clause, and it vacated Gray's death sentence.

E) The Court Of Appeals' Opinion

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the District Court's decision to vacate Gray's death sentence, and affirmed its decision to dismiss Gray's challenge to Virginia's vileness aggravator. With respect to the due process claim, the Court of Appeals did not reach the merits, but instead held that consideration of Gray's claim was barred by this Court's "new rule" doctrine. First, the Court of Appeals defined "the precise rule petitioner seeks [as] a constitutional entitlement to adequate advance notice of particular items of evidence." Gray v. Thompson, 58 F.3d 59, 64 (4th Cir. 1995). This rule neither was advanced by Gray nor established by the District Court's decision. The Court of Appeals then concluded that this specific rule is not dictated by this Court's decision in Gardner. In a concurring opinion, one member of the Court of Appeals panel expressed concern that the majority "has very likely fallen into the trap" of defining the rule for retroactivity analysis as the most specific conclusion or holding the petitioner hopes to be reached. Id. at 68. This panel member believed it to be at least arguable that, were the court to grant the relief requested, the rule to emerge would have been dictated by Gardner. Id. at 67.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT CREATED A NEW RULE WHEN IT APPLIED GARDNER'S GENERAL PRINCIPLES OF DUE PROCESS TO CONCLUDE THAT PETITIONER'S DEATH SENTENCE WAS OBTAINED UNCONSTITUTIONALLY THROUGH PROSECUTORIAL TACTICS OF AMBUSH AND FAILURE TO DISCLOSE EXCULPATORY EVIDENCE CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT, OTHER FOURTH CIRCUIT DECISIONS, AND DECISIONS OF THE FIFTH AND NINTH CIRCUITS.

Certiorari on this question should be granted because the Opinion below conflicts with previous opinions of this Court, other Fourth Circuit decisions, and decisions of the United States Court of Appeals for the Fifth and Ninth Circuits.

A. A Federal Court Generally Does Not Create A New Rule When It Applies General Rules Which Of Necessity Require A Case-By-Case Examination Of The Evidence.

In Teague v. Lane, 489 U.S. 288 (1989), a plurality of this Court adopted the second Justice Harlan's retroactivity approach and held that a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions.[3] See generally Teague, 489 U.S. at 299-316 (plurality opinion). The new rule doctrine is predicated on interests of comity and the finality of criminal convictions. Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993). This principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 231 (1990).

This Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989) demonstrates the critical distinction between the extension of existing precedent on collateral review to announce a new rule, and the mere application of an existing general principle to a new set of facts. Penry claimed he "was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence." Id. at 307. On collateral review, the Fifth Circuit had rejected Penry's claim because his jury was allowed to hear all mitigating evidence, which concerned his mental retardation and his abused childhood. See Penry v. Lynaugh, 832 F.2d 915, 920 (5th Cir. 1987). The Fifth Circuit nevertheless was concerned that, under the Texas scheme, Penry's jury was not able to consider and give effect to his mitigating evidence. See generally id. at 920-26. The Fifth Circuit concluded that it could not rule in Penry's favor "because prior Fifth Circuit decisions have rejected claims similar to Penry's. These prior panel holdings bar a different

[3]The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." Teague, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted). The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990).

holding by us." Id. at 926. Thus, granting Penry the relief he sought would have required the Fifth Circuit to overrule these precedents. This Court granted certiorari.

The Court first addressed whether Penry's claim was barred under Teague. See generally Penry, 492 U.S. at 313-19. Despite the fact that granting Penry the relief he sought would have required the repudiation of prior Fifth Circuit decisions, this Court held that Penry's claim was not barred by Teague because he did not seek a new rule. Rather, he simply sought the application, and not the extension, of a pre-existing rule of law in a new factual setting. Id. at 314-15. The Court explained that:

> [T]he facial validity of the Texas death penalty statute had been upheld in [Jurek v. Texas, 428 U.S. 262 (1976)] on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present. Penry argues that those assurances were not fulfilled in his particular case because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision ... [I]n light of the assurances upon which Jurek was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the state of Texas.

492 U.S. at 318-19 (emphasis in original) (quoting Teague, 489 U.S. at 301) (plurality opinion).

The Jurek rule created a standard which the Court simply applied to the facts of Penry's case. Despite the fact that the specific holding announced in Penry was novel and repudiated prior Fifth Circuit decisions, Penry's claim was not barred by the "new rule" doctrine because it did not impose a new obligation on the state; the state already was obligated to apply the Jurek standard.

Oddly, in prior decisions the Fourth Circuit endorsed the foregoing analysis of the "new rule" doctrine. In Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), cert. denied, 115 S. Ct. 1359 (1995), the Fourth Circuit concluded that the petitioner did not seek a new rule when he relied upon this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) to challenge whether Virginia's facially vague vileness factor was constitutionally applied in his case. After its lengthy analysis of this Court's "new rule" jurisprudence, the Circuit Court held that:

> [W]hen a rule provides a standard that of necessity requires a case-by-case examination, generally the results yielded by that application are not "new rules" because those results do not "break[ ] new ground or impose[ ] a new obligation on the States or the Federal Government." Teague.

> 489 U.S. at 301 (plurality opinion); cf. Penry, 492 U.S. at 315-319 (emphasizing that the application of the pre-existing rule at issue did not impose a new obligation on the state).

35 F.3d at 886.

Similarly, in Ostrander v. Green, 46 F.3d 347 (1995), the Fourth Circuit rejected the Commonwealth of Virginia's argument that a holding in the petitioner's favor on his ineffective assistance of counsel claim would constitute a "new rule." The Fourth Circuit relied upon its own holding in Turner and Justices Kennedy's and O'Connor's concurring opinions in Wright v. West, 112 S. Ct. 2482 (1992), in reaching this conclusion:

> A "rule" is a principle of law we apply to the factual situations -- be they few or many -- within the rule's intended ambit. Though cases are the hardware out of which we fashion rules, rules are more than just cases. Sometimes courts fashion broad rules intended to govern an array of factual settings; often they frame more narrowly. When we ask whether a proffered holding would be a "new rule," we must therefore bear in mind the level of generality at which the prevailing rule or rules are meant to be applied. Turner, 35 F.3d at 883. Just as habeas petitioners could always avoid the Teague bar if we define "rules" at an abstractly broad level of generality (e.g. "due process"), so also could respondents erect the bar in almost every case if we characterize a "rule" as "the most specific conclusion or holding [the petitioner] hopes we reach[.]" Id. (emphasis in original deleted). History does repeat itself, but not frequently or comprehensively enough to provide a case law exemplar for every set of facts.
>
> Here we apply [the ineffective assistance of counsel test of Hill v. Lockhart, 474 U.S. 52 (1985),] "a rule designed for the specific purpose of evaluating a myriad of factual contexts, [so] it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 112 S. Ct. 2482, 2499 (Kennedy, J., concurring in the judgment); see also id. at 2497 (O'Connor, J., concurring in the judgment). Though Justice Kennedy's remark concerned the Jackson v. Virginia standard for evaluating the constitutional sufficiency of evidence of guilt, it is equally applicable to the Hill-Strickland ineffective assistance tests. Indeed, the all but limitless number of evidentiary situations to which Jackson could apply may be approached only by the regrettably vast quantity of ways lawyers can discover to render incompetent assistance. Only a broad 'normative" rule can assure any degree of fairness and consistency in evaluating ineffective assistance claims. An existing normative rule applied to a novel set of facts becomes "new" only if the rule's boundaries are extended, and not merely because its interstices are filled.

46 F.3d at 354.

The Fourth Circuit's decision in this case stands in stark contrast to its decisions in Turner and Ostrander. The Circuit Court simply concluded, contrary to the jurisprudence of this Court, that Gray sought a narrow new constitutional rule entitling him to adequate advance notice of particular items of

evidence, and then held that this narrow and specific rule is not dictated by this Court's decision in Gardner v. Florida. This rule, however, neither was advocated by Gray nor was created by the District Court's decision. The District Court imposed no new obligation on the Commonwealth of Virginia -- it already was bound to honor the Gardner principles in capital sentencing, and the District Court simply applied those principles to the facts of Gray's case. See Penry, 492 U.S. at 318-19. An examination of the Gardner decision and the decisions of this Court upon which it is founded demonstrates that the Fourth Circuit's "new rule" analysis in this case is fundamentally flawed.

B. A Federal Court Generally Does Not Create A "New Rule" Simply By Applying To A New Set Of Facts The General Due Process Principles Relied Upon By This Court To Reach Its Holding in *Gardner v. Florida*.

In its memorandum opinion granting relief, the District Court concluded that Gray's right to due process was violated by the manner in which the Commonwealth presented evidence of the Sorrell murders to the jury. The District Court relied substantially, but not exclusively, upon this Court's holding in Gardner v. Florida, 430 U.S. 349 (1977) to reach this holding. Specifically, the District Court relied upon two intersecting principles of due process applied in Gardner. First, a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny. 430 U.S. at 362. Second, counsel for a capital defendant must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. Id. at 356. Without these safeguards, a state creates the risk that a person will be sentenced to death based on constitutionally unreliable evidence. Id. at 359.

In Gardner, a Florida trial judge sentenced a capital defendant to death, relying in part upon a confidential portion of a pre-sentence investigational report that was not disclosed to or requested by defense counsel. 430 U.S. at 353. The trial judge did not comment on the contents of the confidential portion in reaching his decision, and his findings did not indicate that there was anything of special importance in the undisclosed portion, or that there was any reason other than customary practice for not

disclosing the confidential portion to the parties. Id.

Gardner argued that the trial court violated his right to be sentenced in accordance with due process by considering the confidential portion of the pre-sentence report without disclosing it to defense counsel. The State of Florida placed its primary reliance on this Court's landmark decision in Williams v. New York, 337 U.S. 241 (1949). In that case, as in Gardner, the trial judge rejected the jury's recommendation of mercy and imposed the death sentence in reliance, at least in part, on material contained in a report prepared by the court's probation department. The New York Court of Appeals had affirmed the sentence, rejecting the contention that it was a denial of due process to rely on information supplied by witnesses whom the accused could neither confront nor cross-examine. This Court affirmed the decision of the New York Court of Appeals.

In Gardner, this Court rejected Florida's reliance upon Williams, explaining that:

> In 1949, when the Williams case was decided, no significant constitutional difference between the death sentence and lesser punishments for crime had been expressly recognized by this Court. At that time the Court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within those limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.
>
> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of a criminal proceeding at which he is entitled to the effective assistance of counsel. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 357-59 (emphasis added and citations omitted).

After rejecting Florida's asserted justification for a capital sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information not disclosed to the defendant or his counsel, this Court held simply "that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to explain or deny." 430 U.S. at 362. The Court explained that if the confidential information had been fully disclosed and defense counsel had been given the opportunity to challenge the accuracy or materiality of the information, the trial judge may have decided not to impose death. Therefore, this Court vacated Gardner's sentence, and remanded the case to the Florida Supreme Court with directions to order further proceedings in the trial court not inconsistent with its opinion. Id.

The District Court here also relied upon Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed on other grounds, 451 U.S. 454 (1981), in concluding that the Commonwealth violated Gray's rights by introducing the Sorrell evidence without giving him a meaningful opportunity to defend against it. In Smith, the United States Court of Appeals for the Fifth Circuit affirmed the federal district court's issuance of a writ of habeas corpus based in part upon the state's failure to give trial counsel sufficient time to prepare a defense to certain penalty phase evidence.

Specifically, the State of Texas was permitted to present the testimony of a psychiatrist concerning his opinion of a capital murder defendant's future dangerousness, even though defense counsel did not know that the psychiatrist had examined their client concerning future dangerousness, and even though the psychiatrist's name did not appear on the witness list tendered to the defense prior to trial. The Fifth Circuit relied on Gardner to hold that the state violated the defendant's constitutional rights in the way it introduced the psychiatrist's testimony:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, Gardner v. Florida, 430 U.S. at 357, and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials," Id. at 360. Smith's attorneys were manifestly surprised by Dr. Grigson's testimony. ... The consequences of this surprise were devastating. Thus the trial judge's informality

> and the prosecution's tactics combined to give Smith's attorneys no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, as much as secrecy did in Gardner. Indeed, the sentencing judge in Gardner relied upon a presentence report, prepared by the Florida Parole and Probation Commission ... under conditions that presumably gave some assurance that the reported information would be accurate. Here we deal with testimony offered by one party and not effectively cross-examined by the other; it carries no assurance of reliability whatever.

Smith, 602 F.2d at 699-701 (emphasis added).

More recently the Fifth Circuit held that a federal district court erred in failing to order an evidentiary hearing on a petitioner's claim that he was unfairly surprised by the manner in which the state introduced evidence at the penalty phase of his capital murder trial intended to show that he was involved in an unrelated, unadjudicated double homicide. In Blackmon v. Scott, 22 F.3d 560 (5th Cir.) cert. denied, 115 S. Ct. 671 (1994), the capital murder defendant and his lawyers learned, four days into the guilt phase of his trial, that the Texas prosecutor intended to use, during the penalty phase, evidence of an uncharged Oklahoma double homicide. In his federal habeas proceedings, the petitioner asserted that his death sentence was unconstitutional because the prosecution secreted from him the witnesses who were to testify against him, thus denying him the opportunity to investigate and prepare a defense to the charges against him. This claim was dismissed by the federal district court.

On appeal, the Fifth Circuit remanded Blackmon's case for an evidentiary hearing on this claim. Relying upon this Court's decision in Gardner, the Circuit Court explained that "a state violates a capital defendant's right to due process when it uses evidence at the sentencing phase of the trial which the defendant does not have a meaningful opportunity to rebut." 22 F.3d at 566. Consequently, remand was required to determine "what Blackmon's counsel might have done differently had more time been given to prepare." Id. The Fifth Circuit did not analyze Blackmon's claim under Teague, most likely because it was obvious that he did not seek to create a new rule, but instead sought only to apply general principles of due process to the facts of his case.

In Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995), the

petitioner relied upon Gardner in seeking habeas relief on a claim that his right to confrontation was violated because the trial judge considered hearsay and other improper evidence in making his sentencing determination. The Ninth Circuit held that the petitioner, whose conviction became final in 1984, did not seek a new rule because "[t]he due process requirement that a defendant be advised of all materials to be used against him in sentencing was announced in Gardner v. Florida, 430 U.S. 349 (1977)." 20 F.3d at 953. Consequently, the Ninth Circuit addressed the merits of the petitioner's claim, but rejected it because he had failed to prove that the trial judge considered improper matters in making his sentencing decision. Id. at 957.

The Fourth Circuit has endorsed the holding in Paradis. In a section of Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), explaining that application of a general rule designed for the specific purpose of evaluating a myriad of factual contexts rarely will result in a "new rule," the Fourth Circuit cited Paradis with approval, referring specifically both to its holding that a Jackson v. Virginia challenge is not barred by Teague, and its holding that Teague does not bar application of Gardner's due process principles. 35 F.3d at 885 n.11. Less than one year after the Turner decision, however, the Fourth Circuit decided Gray's case, and held that application of Gardner's principles to his case was barred by Teague. With respect to its decision in Turner, the Fourth Circuit merely stated in a footnote that "[t]his is not a case in which we are asked merely to 'apply an extant normative rule to a new set of facts,' Turner v. Williams, 35 F.3d 872, 885 (4th Cir. 1994), as the rule in Gardner does not apply even generally to this case." Gray, 58 F.3d at 64 n.2. Examination of the District Court and Court of Appeals opinions below, however, demonstrates that Gardner does apply to Gray's case, that the District Court did not create a new rule when it granted relief, and that the Fourth Circuit's attempts to distinguish Gray's case from Gardner are unavailing.

C. This Court's Holding In Gardner v. Florida Controlled And Dictated The District Court's Decision, And The Fourth Circuit's Holding To The Contrary Conflicts With *Gardner*, Other Decisions of This Court, And Decisions Of Other Circuits.

At the beginning of the federal evidentiary hearing, the District Court described the kind of evidence that, if produced by Gray, would lead it to conclude that his due process rights had been violated by the Commonwealth:

> If in fact I were to determine that the Commonwealth had information indicating that somebody else committed these murders, did not inform the defense of that, they never had an opportunity to challenge the information, it went forward, as far as I am concerned, that sentencing hearing would have been constitutionally inadequate. ... I just can't image a circumstance less fair. I mean, this is a person fighting for their life, and you have information that indicates that somebody else might have committed the murder, and you have information that Mr. Gray might have committed the murder, fine. If you tell the defense lawyers about it and let it be hashed out and the jury believes that Mr. Gray committed it, fine. I would have no problem with that. But the circumstances that I have -- and I don't know that this is the situation, obviously. But I am just telling you, that to me would just be terribly unfair, constitutionally unfair.

(A. 266-7) (emphasis added).

In its memorandum opinion granting relief, the District Court made findings that 1) the trial court refused to appoint an investigator to help Gray's attorneys prepare a defense, 2) the prosecutor turned over none of the evidence tending to prove that Timothy Sorrell killed his wife and daughter, even though the trial court ordered him to disclose his exculpatory evidence, 3) at the beginning of the trial, the prosecutor made an unequivocal promise to introduce only statements Coleman Gray allegedly had made about other crimes he committed, but 4) trial counsel learned only on the eve of the sentencing hearing that the prosecutor intended to break his promise and instead present to the jury the testimony of the investigating officer in the Sorrell case, to describe the Sorrell murder scene and display graphic photos of the victims, and the testimony of the medical examiner to describe the causes of death and the nature and extent of the Sorrell's injuries and to display autopsy photographs. Simply stated, the District Court found that "Coleman Gray and his attorneys were ambushed," and that "[t]he consequences of this surprise could not have been more devastating." (A. 948).

Given adequate notice or, at the very least, an honest response to their Brady motion, Gray's defense counsel could have challenged the truth of his accomplice's testimony that he committed the Sorrell murders through effective cross-examination of Detective Slezak. Specifically, defense counsel

could have made at least the following points during Slezak's testimony: 1) Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time, 2) the police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed, 3) Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders, 4) when Timothy Sorrell ran into his wife's parents at the mall, he ignored them, 5) Timothy Sorrell made suspicious comments after he was notified by the police that his wife and child had been found, 6) Timothy Sorrell changed his alibi throughout the murder investigation, 7) Timothy Sorrell had a strong motive to commit these murders -- just two weeks prior to the brutal slayings, he became the beneficiary of an insurance policy written on his wife's life, 8) six days before Coleman Gray's trial, Lisa Sorrell's parents filed a lawsuit seeking to prohibit Timothy Sorrell from collecting the proceeds of the life insurance policy, 9) Timothy Sorrell visited a friend on the night his wife and child disappeared. That evening, five days before their bodies were found, Sorrell allegedly told his friend that his wife and baby were dead, 10) Coleman Gray had an alibi, because Detective Slezak knew that Gray was with his wife the evening of the Sorrell murders, and that there was not sufficient time for the murders to have been committed during Gray's wife's dinner break as previously had been speculated by Slezak, 11) even when Detective Slezak lied to Coleman Gray and told him that his fingerprint had been found at the murder scene, Gray steadfastly maintained his innocence, 12) Detective Slezak had consulted with the Chesapeake Commonwealth's Attorney to determine whether it was appropriate to prosecute Timothy Sorrell.

This list is derived from the federal district court's findings of fact.

The very essence of this case is that, because of the prosecutor's tactics of secrecy and surprise, Gray was not given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. See Gardner, 430 U.S. at 356; Smith v. Estelle, 602 F.2d at 699-701. Gray probably was innocent of the Sorrell murders, but the prosecutor presented him to the jury as probably guilty. As a consequence of the prosecutor's deceitful tactics, Gray was sentenced to death based largely

upon unreliable evidence which he had no opportunity to explain or deny. Gardner, 430 U.S. at 362. Given the plain applicability of these principles to the facts of this case, it is unremarkable that the District Court relied in part upon Gardner to support its decision.

Indeed, Gardner did not create these principles out of whole cloth -- these are principles of due process that lie at the core of this Court's jurisprudence. The District Court understood this, citing In re Oliver, 333 U.S. 257, 273 (1948) and Baldwin v. Hale, 68 U.S. 223, 233 (1863), along with Gardner, for the proposition that the Due Process Clause does not allow the execution of a person on the basis of information which he has no opportunity to explain or deny. In Baldwin, this Court broke no new ground in holding that "[c]ommon justice requires that no man shall be condemned in his personal property without notice and an opportunity to make his defense." 68 U.S. at 233 (citing Nations v. Johnston, 24 How. 203; Boswell v. Otis, 9 How. 350; Oakley v. Aspinwall, 4 N.Y. 514). In Oliver, this Court held that:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of justice; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

333 U.S. at 273.

It is not hyperbole to compare Gray's case with Powell v. Alabama, 287 U.S. 45 (1932). The nine young, illiterate, black defendants in Powell had been charged with a notorious capital crime -- the rape of two white girls on a train outside of Scottsboro, Alabama. The crime allegedly was committed on March 25, 1931, and an indictment was returned on March 31. On that same day, the defendants were arraigned and entered pleas of not guilty. At arraignment, the trial judge "appointed all the members of the bar for the purpose of arraigning the defendants and then ... anticipated that the members of the bar would continue to help the defendants if no counsel appeared." 287 U.S. at 49. The defendants never were asked whether they or their families wished to retain counsel, or whether they wished to have counsel appointed. Id. at 52.

On April 6, six days after indictment, the trials began. The trial court inquired whether the parties were ready for trial, and the state's attorney replied that he was ready. No one answered for the defendants or appeared to represent them. A trial lawyer from Tennessee, however, who was not a member of the local bar, told the court that he had not been employed to represent the defendants, but that people who were interested in their cases had spoken to him about the case. He told the court that he would like to appear along with counsel that the court might appoint to represent the defendants. Id. at 53. The trial court allowed this lawyer to represent the defendants with the assistance of other members of the bar, "[a]nd in this casual fashion the matter of counsel in a capital case was disposed of." 287 U.S. at 56.

This Court explained that it was not enough to assume that counsel thus precipitated into the defendants' cases thought there was no defense, and exercised their best judgment in deciding to proceed to trial without preparation. "Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial." Id. at 58. (emphasis added). In holding that the defendants' due process rights had been violated, this Court explained that:

> It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard." And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall. 350, 368, 369, 21 L. Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

287 U.S. at 68.

Coleman Gray never was indicted for the Sorrell murders, and he learned just three days before the penalty phase of his capital murder trial that the prosecutor intended to introduce a statement he allegedly made that he was involved in the crimes. Then, on the eve of the penalty phase, his counsel learned for the first time that the prosecutor intended to present, in essence, a full-blown trial of the Sorrell murders, including graphic photographic evidence and testimony of the lead detective and the medical examiner. This "notice" was calculated carefully by the prosecutor to deprive Gray of the opportunity to defend himself against the charge that he murdered Lisa and Shanta Sorrell. As a consequence, he was sentenced to death on the basis of information which he had no opportunity to explain or deny, not only in violation of Gardner, but also in contravention of immutable principles of justice, long recognized by this Court, which inhere in the very idea of a free government.

D. The Fourth Circuit's Holding That The District Court Impermissibly Created A New Rule Conflicts With Teague And Its Progeny, With The Ninth Circuit's Decision In Paradis, And With Prior Fourth Circuit Decisions. Moreover, The Fourth Circuit's Holding That Gardner Does Not Control This Case Conflicts With Decisions Of This Court And The Fifth Circuit's Decisions In Estelle and Blackmon.

It is elementary that this Court's Gardner decision and the basic principles of due process upon which it relies must provide the framework within which Gray's claim is to be analyzed. The death penalty states have taken different positions concerning the use of prior unadjudicated conduct in the capital sentencing phase. Of the twenty-four states that have decided the issue, sixteen have held that evidence of unadjudicated offenses is admissible in the capital sentencing phase. Ten of these states have held that, while admissible, the introduction of prior unadjudicated conduct must be accompanied by procedural protections such as a heightened standard of reliability or a limiting instruction regarding the proper use of such evidence. Eight states simply prohibit the use of this kind of evidence. Virginia is one of only six states placing virtually no restrictions upon the introduction of prior unadjudicated conduct. See Steven P. Smith, *Unreliable And Prejudicial: The Use Of Extraneous Unadjudicated Offenses In The Penalty Phases Of Capital Trials*, 93 COLUM. L. REV. 1249, 1267-68 (1993). Given

Virginia's decision to take no prophylactic measures to ensure procedural fairness at the capital sentencing phase, it goes without saying that the Due Process Clause in general, and Gardner and its predecessors in particular, will have more to say about the procedural fairness of a Virginia sentence based upon prior unadjudicated conduct than otherwise might be the case.[4]

Despite this, the Fourth Circuit reached the conclusion that Gardner and the due process principles described therein "do[] not apply even generally to this case." 58 F.3d at 64 n.2. The Circuit Court accomplished this first by defining the rule sought by Gray, in minimalist fashion, as "a constitutional entitlement to adequate advance notice of particular items of evidence." 58 F.3d at 64. (emphasis in original). This rule neither was advanced by Gray nor created by the District Court. By reducing the rule for purposes of Teague analysis to the narrowest possible holding that the District Court might have reached (but in fact did not), the Fourth Circuit ignored the "new rule" jurisprudence of this Court, and its own prior decisions explaining that the rule sought by a petitioner, for Teague purposes, rarely is the most specific conclusion or holding possible. The rest of the Circuit Court's opinion is devoted to explaining why this narrow rule is not dictated by principles of due process. An examination of the Fourth Circuit's opinion demonstrates, however, that the cases and principles upon which it relies are no part of the framework within which Gray's claim must be considered.

First, the Fourth Circuit concluded that Gardner does not apply because it "does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case." 58 F.3d at 64. The Court then suggested that this Court's holding in Gardner is limited only to situations in which the defendant was sentenced on the basis of

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[4]It is interesting, and perhaps telling, to note that, at least in theory, what happened at Gray's sentencing hearing no longer should occur in Virginia. While Virginia continues to place no restrictions upon the use of prior unadjudicated conduct, upon defendant's motion the Commonwealth now must provide written notice of an intention to present this kind of evidence. Va. Code § 19.2-264.3:2. The notice must describe the conduct to be proved, and must include the time and place such conduct will be alleged to have occurred, if that information is available. It is left to the trial court to specify the time by which this notice must be given. Id.

"secret" information:

> [Here], the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. See Williams v. New York, 337 U.S. 241 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). ... If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded.

Gray, 58 F.3d at 64.

The Fourth Circuit's reliance upon this Court's decision in Williams as precedent dictating the reversal of the District Court's decision is troubling. As is explained earlier, in Gardner this Court -- if it did not implicitly overrule the holding in Williams as it relates to capital cases -- at least severely limited its application, because it was decided before the Court recognized a significant constitutional difference between the death penalty and lesser punishments, and because it was decided before it was "clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 357-58.

It also is troubling that the Fourth Circuit represents that defense counsel made no motion for a continuance. As soon as the prosecutor revealed his intent to present the Sorrell evidence at the start of the penalty trial, defense counsel promptly and repeatedly informed the court that they needed more time. (A. 2063-68, 2118-23). The district court made an express factual finding that counsel made a satisfactory request for a continuance. (A. 941). The Fourth Circuit, however, in contravention of this Court's holding in Anderson v. City of Bessemer City, 470 U.S. 564 (1985), ignored this factual finding and concluded that Gray's counsel did not ask for a continuance.

Perhaps most troubling of all is the Fourth Circuit's conclusion that, because Gray took the stand and addressed the jury after presentation of the Sorrell evidence, he was given a fair opportunity to defend himself. According to the Fourth Circuit, Gray therefore "had an opportunity to explain or deny the evidence. This case is thus distinguishable from Gardner on first principles." Gray, 58 F.3d at 64.

(emphasis in original). This may be the first case in which a court has suggested that a defendant's right to take the stand, without more, is a substitute for adequate notice and an opportunity to prepare a defense to the prosecution's case against him. See Powell, 287 U.S. at 68 ("It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they ... constitute basic elements of the constitutional requirement of due process of law").

Next, the Fourth Circuit states that "Gardner itself warned against broad expansions of its holding." Gray, 58 F.3d at 64. For this proposition, the Circuit Court cites a footnote in Gardner which explains that the fact that principles of due process apply at the sentencing phase of a capital murder trial does not implicate the entire panoply of criminal trial procedural rights. Gardner, 430 U.S. at 358 n.9. According to the Fourth Circuit, because due process generally does not require that advance discovery of witness statements be given to criminal defendants, and because:

> [t]his practice has, to our knowledge, never been found to offend the Due Process Clause[, therefore,] [i]n light of the fact that Gardner expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, Gardner did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

58 F.3d at 65.

The Fourth Circuit was able to reach this conclusion only by taking Gardner's footnote nine completely out of context. The remainder of the footnote, which is ignored by the Fourth Circuit, quotes as follows from this Court's decision in Morrissey v. Brewer, 408 U.S. 471, 481 (1972):

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. ... Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Gardner, 430 U.S. at 358 n.9. (emphasis added). The Fourth Circuit's opinion to the contrary, Gardner does not warn against broad expansions of its holding. Instead, it teaches that the principles of due

process it relies upon are flexible and must be applied on a case-by-case basis. In other words, application of Gardner's principles to a new set of facts rarely will result in a "new rule."

Indeed, in 1991, the author of the majority opinion in this case authored an opinion in a non-capital case in which he relied upon Gardner as authority for vacating a sentence. In United States v. Bakker, 925 F.2d 728 (4th Cir. 1991), the defendant was convicted in federal district court on charges of mail fraud, wire fraud, and conspiracy arising out of his activities as a television evangelist. On appeal to the Fourth Circuit, Bakker argued that his sentence was unconstitutional because the trial judge violated due process by factoring his own sense of religiosity and victimization into the sentence he imposed on him. Specifically, during sentencing, the judge stated that Bakker:

> [h]ad no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.

925 F.2d at 740 (emphasis in original).

The Fourth Circuit held that the trial court abused its discretion in sentencing Bakker, and, implicitly, that his sentence was unconstitutional. The Circuit Court relied in part upon Gardner in reaching this conclusion. Id. Surely, if Gardner's principles of due process applied in Bakker, they apply with greater force and effect under the circumstances presented in this case.

Next, the Fourth Circuit held that it was error for the District Court to rely upon the Fifth Circuit's decision in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), affirmed on other grounds, 451 U.S. 454 (1981). Specifically, the District Court relied upon the portion of Smith explaining that "surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the true-seeking functions of trials.'" 602 F.2d at 699 (citations omitted). The Fourth Circuit criticized the District Court's reliance on Smith as follows:

> The Estelle decision was based on Gardner. Estelle, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. Extending the holding of Gardner, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the Estelle court may have been free to make that leap in extending Gardner, such analysis is no longer permissible on collateral review.

Gray, 58 F.3d at 65 (citations omitted). That the Fourth Circuit believes the Fifth Circuit's decision in Smith now would be barred by the new rule doctrine demonstrates its excessively narrow view of Teague. Both Gardner and Smith involved state action which deprived a capital defendant of the opportunity to deny or explain the information upon which he was sentenced to death. The distinction drawn by the Fourth Circuit between the secrecy in Gardner and surprise in Estelle is without constitutional significance. Moreover, the Fourth Circuit ignores that this case involves both surprise and secrecy -- not only was Gray deprived of fair notice, but he also was deprived of the evidence demonstrating that Timothy Sorrell may have committed these murders.

Finally, the Fourth Circuit states that Gray's "contention rings hollow on its facts, because he "has advanced no meaningful way in which he would have proceeded any differently at the penalty phase" given sufficient notice. Gray, 58 F.3d at 66. The Fourth Circuit is able to make this statement only by ignoring the substantial evidence held by the Commonwealth concerning Timothy Sorrell, by relegating him to a footnote in the opinion, by describing him as "an initial suspect," and by "refus[ing] to be dragged into a mini-trial on the respective strengths of the cases against Sorrell and petitioner." Id. at 66 n.3. Thus, the Fourth Circuit avoids the thorniest issue of fact in this case -- that there was substantial evidence tending to prove that Timothy Sorrell committed these murders, and practically no evidence linking Gray to the crime. Even without an honest and complete response to his Brady motion, given adequate notice Gray likely could have uncovered much of the evidence against Timothy Sorrell, and could have used it to defend himself against the charge that he committed these terrible crimes. Indeed, it seems doubtful that the prosecutor would have presented this evidence knowing that it could be defended so effectively. Gray's due process rights were violated by the prosecutor, and the Fourth Circuit was able to conclude to the contrary only because of its excessively narrow view of the facts, as

well as the controlling law. The end result of its narrow logic is a decision which conflicts with controlling opinions of this Court, with the Fifth Circuit's opinions in Smith and Blackmon, and with the Ninth Circuit's opinion in Paradis that Gardner claims typically are not barred by Teague.

The Fourth Circuit's confusion perhaps can be traced to its misunderstandings concerning the Teague doctrine and the District Court decision. The Fourth Circuit's opinion reflects a belief that the new rule doctrine requires federal courts to treat to state court decisions concerning "state practices of criminal procedure ... with substantial deference." Gray, 58 F.3d at 66. In this Court's decision in Wright v. West, 112 S. Ct. 2482 (1992), Justice O'Connor, in her concurring opinion, explained that the Teague doctrine is not a rule of deference:

> Teague did not establish a "deferential" standard of review of state court determinations of federal law. It did not establish a standard of review at all. Instead, Teague simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final. Penry, supra, 492 U.S. at 314; Teague, supra, 489 U.S. at 301. In Teague, we refused to give state prisoners the retroactive benefit of new rules of law, but we did not create any deferential standard of review with regard to old rules.

Wright, 112 S. Ct at 2497. Justice O'Connor explained further that the Teague doctrine does not permit federal courts to abdicate the duty to review independently a state conviction, and instead defer to "reasonable," though wrongly decided, state court decisions, because "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is." Id.

In this case, the District Court simply fulfilled its independent obligation to say what the law is, and held that the Commonwealth's tactics of secrecy and surprise violated basic principles of due process, espoused in Gardner and other decisions of this Court. Contrary to the Fourth Circuit's conclusions, the District Court's decision imposed no new obligations on the Commonwealth of Virginia. The Commonwealth already was bound by Gardner to ensure that Gray was given a fair opportunity to defend himself against the charge that he murdered the Sorrells. The District Court did not require that, in the future, Virginia capital defendants receive any kind of discovery whatsoever. Rather, the District Court simply held that, under the circumstances involved in this case, Gray was sentenced to death without due

process of law.

The Fourth Circuit was able to reverse the District Court only through gross misapplications of this Court's "new rule" doctrine and of Gardner's holding. The decision below is thus in conflict with the decisions of this Court, the Ninth Circuit, and the Fifth Circuit. If this decision is allowed to stand, it will stand as precedent allowing, if not commanding, federal courts to refuse to reach the merits of most constitutional claims raised by federal habeas petitioners, and instead to defer at all costs to state court decisions. This is not the intent of Teague and its progeny, and this Court should grant certiorari to review the Fourth Circuit's decision.

II. THE FOURTH CIRCUIT'S HOLDING, WHICH ALLOWS A PROSECUTOR TO WITHHOLD FROM A CAPITAL DEFENDANT EVIDENCE TENDING TO PROVE THAT ANOTHER PERSON COMMITTED THE NOTORIOUS DOUBLE HOMICIDE UPON WHICH THE STATE RELIED TO PROVE AT SENTENCING THAT THE DEFENDANT POSED A FUTURE DANGER TO SOCIETY, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN BRADY V. MARYLAND AND ITS PROGENY, INCLUDING *KYLES V. WHITLEY*.

Certiorari on this question should be granted because the Opinion below conflicts with this Court's landmark decision in Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, including the Court's recent decision in Kyles v. Whitley, 115 S. Ct. 1555 (1995). Kyles was decided after this case was briefed in the Fourth Circuit on the merits, but before oral argument. At oral argument, counsel for Gray informed the Circuit Court of the Kyles opinion, and described its applicability to this case. Gray also relied upon Kyles in his Petition for Rehearing and Suggestion for Rehearing En Banc to the Fourth Circuit. Nevertheless, the Fourth Circuit failed to consider whether Gray was entitled to relief under Kyles.

The District Court made findings of fact that Gray's counsel made a request to the prosecutor for the disclosure of exculpatory evidence, but that the prosecutor failed to disclose a substantial amount of exculpatory evidence tending to prove that Timothy Sorrell murdered his wife and child, and that Gray was not involved in the crimes. This evidence has been described in detail earlier in this Petition.

During the District Court evidentiary hearing, the prosecutor maintained that, to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray," testimony found by the District Court to be "patently absurd." (A. 943).

Detective Slezak's knowledge of the evidence concerning Timothy Sorrell "would have fueled a withering cross-examination, destroying confidence in [Tucker's] story [that Gray confessed to the crimes] and raising a substantial implication that the prosecutor had coached [Slezak] to [avoid discussion of Timothy Sorrell]. 115 S. Ct. at 1570. This cross-examination also would have demonstrated the possibilities 1) "that the lead police detective who testified was either less than wholly candid or less than fully informed," Kyles, 115 S. Ct. at 1575, 2) "that the investigation was limited by the [prosecution's] uncritical readiness to accept the story and suggestions of an informant [Tucker]," id. and 3) that the prosecution, police, and Tucker "set up" Gray, id. at 1573. It would have demonstrated the complete lack of "thoroughness and even [of] good faith of the investigation." Id. at 1571. It also would have shown that Gray had an alibi. (A. 943). In sum, it would have completely undermined the prosecution's penalty phase case, and it therefore must "undermine[] [our] confidence in the outcome of the trial." Kyles, 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)). In other words, the exculpatory evidence withheld by the prosecutor was material, and the Fourth Circuit should have affirmed the District Court's grant of the writ of habeas corpus, based on Brady and Kyles.

Ironically, during penalty phase closing arguments the prosecutor asked the jury whether Gray "s[a]t in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?" (A. 2263). In fact, it is the prosecutor who chose to try Gray for the Sorrell murders without charges and without due process of law.

Nevertheless, the Fourth Circuit avoided the Kyles issue in this case by cavalierly ignoring the significance of the evidence tending to show that Timothy Sorrell killed his wife and daughter. Sorrell was the Commonwealth's sole suspect for many months, and remained the Commonwealth's primary

suspect right up until the time of Gray's trial. Yet, the Fourth Circuit refers to him only as an "initial suspect," and "refus[es] to be dragged into a mini-trial on the respective strengths of the case against Sorrell and petitioner." Gray, 58 F.3d at 66. The Fourth Circuit's Opinion is in direct conflict with this Court's decisions in Brady and Kyles, and if it is allowed to stand as precedent it will allow "the adversary system of prosecution [in Virginia] to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." Kyles, 115 S. Ct. at 1568. This Court should grant certiorari to review the Fourth Circuit's decision.

III. THE FOURTH CIRCUIT'S HOLDING THAT VIRGINIA'S LIMITING CONSTRUCTIONS CONSTITUTIONALLY ARE SUFFICIENT TO CURE THE FACIAL VAGUENESS OF THE "VILENESS" AGGRAVATOR IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Certiorari should be granted on this question because the Court of Appeals' affirmance of Virginia's limiting constructions for the "depravity of mind" and "aggravated battery" components of the "vileness" aggravating circumstance is contrary to this Court's decisions in Godfrey v. Georgia, 446 U.S. 420 (1980), and subsequent cases. Specifically, these limiting constructions fail to narrow to a subclass the defendants convicted of murder who may be sentenced to death, because these limiting constructions virtually apply to the facts surrounding any murder.

In Godfrey, this Court held that a vileness aggravating factor identical to the one used in Virginia was unconstitutionally vague and overbroad on its face absent clarifying and narrowing jury instructions and appellate review to restrict imposition of the death penalty to crimes lying at the core of the vileness factor, and not at its periphery. More recently, the Court has explained that the Eighth and Fourteenth Amendments require statutory aggravating factors to meet two standards to justify a death sentence. First, "the aggravating circumstance may not be unconstitutionally vague" -- that is, it must have a "'common-sense core of meaning ... that criminal juries should be capable of understanding.'" Tuilaepa v. California, 114 S. Ct. 2630, 2635-36 (1994) citing Godfrey, 446 U.S. at 428, and Arave v. Creech, 113 S. Ct. 1534, 1541 (1993), and quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J.,

concurring). Second, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuileapa, 114 S. Ct. at 2635 (citing Arave, 113 S. Ct. at 1542). Moreover, a statutory aggravating circumstance that is too vague as stated can be used only if the jury is given a tightly drawn definition instruction, or if the state appellate court reviews the particular finding with a consistent and narrow appellate construction. See e.g., Walton v. Arizona, 497 U.S. 639, 653 (1990) ("when a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutional on its face.").

In an opinion proceeding Godfrey, the Virginia Supreme Court developed limiting constructions for the terms "depravity of mind" and "aggravated battery" used in Virginia's "vileness" aggravator. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978); Va. Code § 19.2-264.2. The Court did this because it, like this Court in Godfrey, recognized that "any act of murder arguably involves 'depravity of mind' and an 'aggravated battery to the victim,' [and] it is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance." Id. The Court responded to this problem by defining depravity of mind to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Id. Aggravated battery was defined "to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Id. According to the Virginia Supreme Court, "these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, 'outrageously or wantonly vile, horrible or inhuman'." Id.

In this case, the trial court instructed the jury that the Commonwealth must prove the "vileness" aggravator beyond a reasonable doubt. (A. 2234). The court then gave the jury limiting instructions

mimicking Smith's depravity of mind and aggravated battery constructions (although the court mistakenly instructed the jury about "physical" debasement instead of "psychical" debasement).[5] The trial court did not define "moral turpitude," "psychical," "debasement," "ordinary legal malice," or "premeditation." Nor did the court explain what degree of moral turpitude and psychical basement are inherent in the definition of ordinary legal malice and premeditation. After deliberating for one hour and ten minutes, the jury returned a verdict finding beyond a reasonable doubt that Gray's conduct satisfied the "vileness" aggravator. The Fourth Circuit held that these limiting instructions meet the constitutional standards set forth in Godfrey. They do not.

The trial court's definition of "depravity of mind" did nothing to channel the jury's discretion in this case. Even an experienced jurist would have difficulty making sense of and taking direction from "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Even with further definitions of "malice" and "premeditation," (which were not given here) these instruction do not meet the United States Supreme Court's requirement that aggravating factors have a common-sense core of meaning that criminal juries should be capable of understanding. Tuilaepa, 114 S. Ct. at 2635-36. "Moral turpitude" at best is only an alternative formulation of "baseness," "depravity," or "vileness," words that the Court has rejected as a constitutional basis for imposing the death penalty. See Godrey, 446 U.S. at 428-29. "Psychical debasement" has no apparent meaning at all and could refer to corruption from supernatural, spiritual, mental, moral, emotional, intuitive or any of several other influences.

Simply stated, this "limiting" instruction presupposes that a jury of lay-people know what "ordinary legal malice and premeditation" are, requires that they determine how much "moral turpitude"

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[5]This mistake alone made the depravity of mind limiting instruction unconstitutionally vague. The depravity of mind standard obviously is intended to focus the jury on the defendant's state of mind, but this mistake focused the jury on the victim's injuries. A jury reasonably could decide that any murder involves physical debasement of the victim.

and "psychical debasement" are "inherent" in ordinary legal malice and premeditation, and then determine whether the particular offense "surpasses" this ordinary level of debasement and turpitude. This instruction simply provided no guidance to the Gray jury. See Deutscher v. Whitley, 884 F.2d 1152, 1162 n.1 (9th Cir. 1989), vacated and remanded, 500 U.S. 901 (1991), on remand, 946 F.2d 1443, 1446-47 (9th Cir. 1991), vacated and remanded, 113 S. Ct. 367 (1992), on remand, 16 F.3d 981 (9th Cir. 1994) (rejecting as unconstitutionally vague a "depravity of mind" limiting instruction describing the term as "characterized by an inherent deficiency of moral sense and rectitude, and consisting of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life").

Similarly, the limiting instruction for the aggravated battery circumstance is unconstitutional because it reasonably can apply to every murder, and does not truly limit the class of murders for which the death penalty may be imposed. To determine that an aggravated battery is "qualitatively or quantitatively more culpable than the minimum necessary to accomplish an act of murder" requires an articulable sense of the "minimum necessary." For any murder, jurors could and would imagine a situation less culpable than the one before them. A murder by one knife wound may seem excessively gory compared to a murder accomplished with a well-placed bullet, or the opposite may be true, depending on one's preferences. Both murders could exceed a jury's sense of the "necessary" minimum.

Indeed, with its overbroad definitions of "depravity of mind" and "aggravated battery" the Virginia Supreme Court has created as a standard a hypothetical murder in which a theoretical criminal uses just enough force to commit a murder and acts with the absolute minimum of malice and premeditation. Rather than creating a specific and well-defined class of murders for which the death penalty is appropriate, they simply create a singular fictional murder for which capital punishment may not be imposed and allow the death penalty in all other cases where the theoretical minimum is exceeded. This is not guidance. It is the unbridled discretion forbidden by every holding of the this Court since

Furman v. Georgia, 408 U.S. 238 (1972). The failure of the trial court to provide sufficiently narrow limiting instructions to constrain the jury's discretion to impose the death sentence based on a finding of "vileness" warrants a grant of certiorari.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

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EDITOR'S NOTE

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Dennis C. Vacco, Atty. Gen. of the State of N.Y., Nancy A. Spiegel, Asst. Atty. Gen., of counsel), for respondent-appellee.

Before: WINTER, MAHONEY, and JACOBS, Circuit Judges.

PER CURIAM:

We affirm for substantially the reasons stated in Judge Curtin's opinion. *See* — F.Supp. —.

Coleman Wayne GRAY, Petitioner-Appellee,

v.

Charles E. THOMPSON, Warden, Mecklenburg Correctional Center, Respondent-Appellant.

Coleman Wayne GRAY, Petitioner-Appellant,

v.

Charles E. THOMPSON, Warden, Mecklenburg Correctional Center, Respondent-Appellee.

Nos. 94-4009, 94-4011.

United States Court of Appeals, Fourth Circuit.

Argued May 3, 1995.

Decided June 28, 1995.

Federal habeas corpus petition was filed after capital murder conviction and death sentence were affirmed on direct appeal by the Virginia Supreme Court, 233 Va. 313, 356 S.E.2d 157. The United States District Court for the Eastern District of Virginia, James R. Spencer, J., granted writ and vacated death sentence. Appeal was taken. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) aggravating factor of vileness was not unconstitutionally vague; (2) use of supplemental evidence of other killings as proof of future dangerousness did not violate due process; (3) due process did not require appointment of private investigator for defense; and (4) evidence was sufficient to support conviction.

Reversed and remanded.

K.K. Hall, Circuit Judge, concurred and filed opinion.

1. Homicide ⇐351, 357(11)

Vileness aggravating factor, justifying death sentence for murder defendant, was not unconstitutionally vague in light of limiting instruction given in *Smith* which defines depravity of mind as great moral turpitude, physical debasement surpassing ordinary malice and premeditation, and aggravated battery as battery which was more culpable than minimum needed to accomplish act of murder. U.S.C.A. Const.Amends. 5, 14; Va. Code 1950, § 19.2-264.2(1).

2. Criminal Law ⇐1208.1(6)

Evidence of criminal misconduct for which defendant has been neither tried nor convicted may be considered when deciding whether defendant's "future dangerousness" justifies death penalty. Va.Code 1950, § 19.2-264.2(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐266(4)
Habeas Corpus ⇐508
Homicide ⇐358(1)

Prosecution's use of petitioner's statements implicating him in other murders, to show future dangerousness and justify death penalty in underlying murder prosecution, did not violate due process or entitle petitioner to federal habeas corpus relief; evidence of petitioner's future dangerousness was advanced in open court, counsel could cross-examine adverse witnesses, there was no federal right to advance notice of witness' statements and, in any event, knowledge of specific evidence offered was not needed to prepare defense; petitioner was not entitled to advance notice of particular items of evidence used during sentencing. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐461

Federal courts may not generally create or apply new constitutional rights on unilateral review of state conviction. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐461

Petitioner sentenced to death for state murder conviction was not entitled to federal habeas corpus relief based on state court's refusal to appoint private investigator for defense; declaring that due process entitled defendant to private investigator would be new constitutional ground and bare assertion that private investigator would have benefitted petitioner did not allege due process violation. U.S.C.A. Const.Amends. 5, 14; 28 U.S.C.A. § 2254.

6. Homicide ⇐253(2)

State capital murder conviction for execution-style shooting was supported by testimony that petitioner shot victim, that petitioner admitted shooting victim, and that petitioner, rather than accomplice, was acquainted with victim and angry with victim for firing his wife and, thus, alleged insufficiency of evidence could not be basis for granting federal habeas corpus relief. 28 U.S.C.A. § 2254.

7. Habeas Corpus ⇐404

Prosecution's failure to remit all impeachment evidence regarding prosecution witness, allegedly precluding petitioner from raising matter of prosecution witness' perjury was not "cause and prejudice" needed to obtain federal habeas corpus review of perjury claim that was otherwise procedurally barred; petitioner's counsel possessed relevant information when state habeas petition was filed but did not assert claim. 28 U.S.C.A. § 2254.

ARGUED: John H. McLees, Jr., Asst. Atty. Gen., Richmond, VA, for appellant. Paul G. Turner, Christian, Barton, Epps, Brent & Chappell, Richmond, VA, for appellee. ON BRIEF: James S. Gilmore, III, Atty. Gen., Richmond, VA, for appellant. Donald R. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, VA, for appellee.

Before HALL, WILKINSON, and WILKINS, Circuit Judges.

Reversed and remanded with instructions to dismiss by published opinion. Judge WILKINSON wrote the opinion, in which Judge WILKINS joined. Judge HALL wrote a concurring opinion.

OPINION

WILKINSON, Circuit Judge:

Coleman Wayne Gray was convicted of capital murder in a Virginia court. Gray exhausted his state remedies and then petitioned for a writ of habeas corpus, alleging, *inter alia*, that his sentencing violated the Due Process Clause. On that ground the district court issued the writ, and the Commonwealth of Virginia now appeals. We reverse and remand with instructions to dismiss the petition.

I.

On the evening of May 2, 1985, Gray and his friend Melvin Tucker drove into the parking lot of a Murphy's Mart department store in Portsmouth, Virginia. They observed the store manager, Richard McClelland, inside. McClelland had recently discharged Gray's wife from her job at the store, thereby displeasing Gray, who told a friend he was "going to get" McClelland. When McClelland left work in his automobile, Gray and Tucker followed. *See Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, 172 (1987).

At an intersection, Gray pulled his car in front of McClelland's and blocked the road. Armed with a .32 caliber revolver, Gray ordered McClelland into Gray's car. Gray and his two passengers then returned to Murphy's Mart. While Tucker waited in the car, Gray forced McClelland inside the store at gunpoint. McClelland was told that if he refused to cooperate, his family would suffer. Gray and McClelland then emerged from the store with three sacks of cash containing

APPENDIX A

approximately $12,000. They joined Tucker in the car and departed. *Id.*

Gray drove to a service station and fueled the automobile. He removed a gas can from the trunk and filled it with gasoline as well. Gray then proceeded to a remote dirt road, stopped the car, and commanded McClelland to get out. Gray ordered McClelland to lie face down on the ground. As McClelland did so, he begged Gray not to hurt him. Gray assured McClelland he had nothing to fear, and then fired six bullets into the back of McClelland's head with the .32 caliber handgun. The shooting was execution style: the shots were fired in rapid succession, from a range of three to eighteen inches. Gray told Tucker as they drove away from the murder scene that he had to shoot McClelland because McClelland knew him. *Id.*, 356 S.E.2d at 172–73.

The two men then returned to the intersection where they first abducted McClelland. Gray informed Tucker that he intended to burn McClelland's car to destroy the evidence. Gray soaked the interior of McClelland's car with gasoline from the gas can, tossed a lit match into the car, and fled. Gray and Tucker returned to Gray's apartment to count the money. *Id.* at 173.

Both Gray and Tucker were subsequently indicted on various criminal counts. Tucker pleaded guilty to lesser charges in exchange for agreeing to testify against Gray. Gray, however, went to trial for armed robbery, abduction, arson, unlawful firearm use, and capital murder. In a pre-trial motion, Gray's counsel asked the court to appoint a private investigator to assist the defense, but the motion was denied. Gray's counsel also moved for discovery under Rule 3A:11 of the Virginia Supreme Court. The court issued a discovery order pursuant to that Rule and included an additional provision requiring the disclosure of exculpatory evidence.

On Monday, December 2, 1985, the guilt phase of Gray's trial began. Following a motion by the defense under *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520(Va.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983), the Commonwealth's Attorney informed the defense of evidence he planned to introduce at the penalty phase to show Gray's future dangerousness. Specifically, he stated that prosecution witnesses would testify that Gray told them he killed a mother and daughter named Lisa and Shanta Sorrell. At the guilt phase, the key issue was whether Gray was the actual triggerman in the McClelland murder. Gray chose not to take the stand but his counsel argued that it was Tucker, not Gray, who shot McClelland, while Tucker asserted just the opposite. Two witnesses for the prosecution, who had been imprisoned with Gray, testified that Gray told them he killed McClelland.

On Thursday, December 5, 1985, the jury convicted Gray on all counts. That evening, the Commonwealth's Attorney informed the defense that at the penalty phase, scheduled to begin the next morning, he intended to offer evidence of the Sorrell murders in addition to the incriminating statements that he discussed with the defense on Monday. The proposed evidence consisted of testimony by the police detective who investigated the murders, testimony by the state medical examiner who performed the victims' autopsies, and photographs and forensic evidence of the crime scene. Defense counsel interviewed the police detective over the telephone that night.

The following morning, Friday, December 6, the penalty phase began. During an in-chambers conference, Gray's counsel asked the court to exclude the additional Sorrell evidence on the ground that it exceeded the scope of corroborating evidence permissible under state law, and that they were unprepared to rebut it that day. The court expressed the view that the evidence was admissible at sentencing.

At the penalty phase, the prosecution first offered evidence of other criminal acts committed by Gray. That evidence included his criminal record, which the Virginia Supreme Court noted reflected thirteen felony convictions, at least nine of which were for violent crimes. *See Gray*, 356 S.E.2d at 179.

Tucker then took the stand on behalf of the Commonwealth and addressed the Sorrell murders. He testified that shortly after the McClelland murder, he and Gray were

scanning the local paper for news of the McClelland investigation. According to Tucker, Gray pointed to a picture of Lisa Sorrell in the paper and declared that he had killed her. At the close of Tucker's direct examination, the defense stated that it had no questions of him. The defense at that time formally moved to exclude the additional Sorrell evidence, but the motion was denied. The court noted that defense counsel had been informed of the evidence the day before.

The Commonwealth next called Detective Michael Slezak. Slezak testified that he discovered the body of Lisa Sorrell in the driver's seat of a burned-out automobile and found the body of three-year-old Shanta in the trunk. He also testified that an expended match was recovered from the interior of the car: the automobile, like McClelland's, was apparently ignited after the murder. Slezak identified several photographs of the crime scene, which were each admitted into evidence. He offered no opinion on who was responsible for the murders, however. The defense then cross-examined Slezak. The questions emphasized the highly-publicized nature of the Sorrell murders and suggested that due to the possibility of a "copycat crime," the Sorrell and McClelland murders might not have been committed by the same person.

Finally, the Commonwealth called the medical examiner, Dr. Faruk Presswalla. His statements indicated that the Sorrell murders were performed in a manner strikingly similar to that of the McClelland murder. He testified that Lisa Sorrell was killed by six .32 caliber gunshots to the back of her head, and that Shanta died from smoke inhalation. He identified autopsy photographs, which were admitted into evidence. The prosecution also introduced Dr. Presswalla's autopsy report. The defense stipulated to Dr. Presswalla's expert status and declined to cross-examine him.

The defense, in turn, called seven witnesses to present mitigating evidence. They testified largely to their favorable opinions of Gray's character. *Gray*, 356 S.E.2d at 177. Then, Gray himself took the stand. He denied any involvement whatsoever in the Sorrell murders. When asked whether he had anything he wished to say to the jury, he stated that his participation in the McClelland murder was limited to driving the car, and he swore that it was not he who pulled the trigger and killed McClelland.

The court instructed the jury on the aggravating factors under the Virginia death penalty statute—the vileness of the crime charged and the future dangerousness of the defendant. Upon deliberation, the jury unanimously found the existence of both aggravators and fixed Gray's sentence at death.

The Virginia Supreme Court affirmed Gray's conviction and sentence, *Gray*, 356 S.E.2d 157, and the U.S. Supreme Court denied certiorari. 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). Gray then instituted state habeas proceedings. The state habeas court dismissed the petition, the Virginia Supreme Court summarily affirmed the dismissal, and the U.S. Supreme Court again denied certiorari. *Gray v. Thompson*, 500 U.S. 949, 111 S.Ct. 2250, 114 L.Ed.2d 491 (1991).

Thereafter, Gray filed the instant petition for a writ of habeas corpus. He alleged numerous constitutional violations with respect to both phases of the trial. The district court held an evidentiary hearing and heard testimony from trial counsel and the prosecution witnesses as to the events at sentencing. Of particular interest to the district court was Detective Slezak's testimony that Timothy Sorrell, Lisa's husband, had been an initial suspect in the Sorrell murders, although upon further investigation he was not charged. The district court granted the writ and vacated Gray's sentence, finding that the prosecution had "violated the moral standards of fair play embodied in the Due Process Clause" by unfairly surprising the defense with the additional Sorrell evidence. The decision was stayed pending this appeal.

II.

The primary challenges to Gray's sentence involve the aggravating factors found by the jury. Petitioner asserts that the vileness element as applied to him was unconstitutionally vague under *Godfrey v. Georgia*,

U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). He also contends that use of the supplemental Sorrell evidence as proof of future dangerousness was unconstitutional under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). We hold that the district court properly rejected the former claim, but that it erred in issuing the writ based on the latter.

A.

[1] We first address the vileness factor. Virginia law provides that a jury may impose the death sentence if it finds that the conduct "for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2(1). To pass muster under *Godfrey*, a sentencing factor must be sufficiently limited to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" 446 U.S. at 428, 100 S.Ct. at 1765. Even before *Godfrey* was decided, however, the Virginia Supreme Court provided a narrowing construction of the vileness provision. *See Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978) (defining depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" and aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Here, the court gave the *Smith* definitions to the jury essentially *verbatim*, and the jury found unanimously that Gray's murder of McClelland satisfied the vileness predicate.

We have repeatedly held that limiting instructions based on *Smith* meet the constitutional standard set forth in *Godfrey*. *See Turner v. Williams*, 35 F.3d 872, 891–92 (4th Cir.1994); *Jones v. Murray*, 976 F.2d 169, 174–75 (4th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 27, 120 L.Ed.2d 951 (1992); *Jones v. Murray*, 947 F.2d 1106, 1117 (4th Cir. 1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir.1989), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990); *Turner v. Bass*, 753 F.2d 342, 350–53 (4th Cir.1985), *reversed in part on other grounds*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). It is manifest that *Godfrey* does not demand more. *See Turner v. Bass*, 753 F.2d at 353 ("*Godfrey* [does not] require[ ] that a jury be instructed on each term in the aggravating circumstances.").

B.

[2] We next turn to the question of future dangerousness.[1] Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va.Code § 19.2-264.2(1). In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986). This rule of latitude—which also allows the defendant to present a wide range of mitigating evidence—was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d

1. Petitioner and the Commonwealth disagree about the effect of a holding that the future dangerousness finding was invalidated by the additional Sorrell evidence. Petitioner contends that it would vitiate the entire sentence, whereas the Commonwealth argues that the sentence could be supported by the independent jury finding of vileness. *See Zant v. Stephens*, 462 U.S. 862, 887 n. 24, 103 S.Ct. 2733, 2748 n.24, 77 L.Ed.2d 235 (1983); *Briley v. Bass*, 750 F.2d 1238, 1245 n. 12 (4th Cir.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). In view of our disposition of the future dangerousness claim, *infra*, we need not reach this question.

859 (1976); *see Gray*, 356 S.E.2d at 175 (relying on *Gregg*); *Watkins*, 331 S.E.2d at 435–36 (relying on *Jurek v. Texas*, 428 U.S. 262, 275–76, 96 S.Ct. 2950, 2957–58, 49 L.Ed.2d 929 (1976)).

[3] In the instant case, petitioner claims that the future dangerousness verdict is invalid because he was unfairly surprised by the additional Sorrell murder evidence, and that effective rebuttal of the prosecution's evidence was thereby precluded. Petitioner and his counsel knew at the outset of the guilt phase that he would be accused of the Sorrell murders in penalty proceedings, however, and were informed of the additional evidence the night before that phase began. Thus, the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence.

[4] In *Caspari v. Bohlen* the Supreme Court made clear that federal courts *must* analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, if the state so argues. — U.S. —, —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994). The district court, however, never acknowledged this mandatory framework in its final opinion. We now address the question, and we find that petitioner's rule would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990). Because federal courts generally may not create or apply new constitutional rights on collateral review, *id.* at 487, 110 S.Ct. at 1259, petitioner's claim must fail.

Petitioner relies largely on *Gardner v. Florida*, *supra*, for the proposition that use of the Sorrell evidence violated the Due Process Clause. That case, however, does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case. In *Gardner*, the judge relied on confidential portions of a presentence report in deciding to sentence the defendant to death, but never disclosed that information to the defense until judgment was entered. 430 U.S. at 353, 97 S.Ct. at 1202. Because the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain," the sentencing proceeding was unconstitutional. *Id.* at 362, 97 S.Ct. at 1207.

Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner *had* an opportunity to explain or deny the evidence. This case is thus distinguishable from *Gardner* on first principles. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir.1982) (explaining that *Gardner* "simply prohibits the use of 'secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal."), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983).[2]

Gardner itself warned against broad expansions of its holding. Although *Gardner* extended the guarantee of due process to the sentencing context, the extension was carefully circumscribed. The fact that due process applied at sentencing did not transport

2. It follows that this is not a case in which we are asked merely to "apply an extant normative rule to a new set of facts," *Turner v. Williams*, 35 F.3d 872, 885 (4th Cir.1994), as the rule in *Gardner* does not apply even generally to this case.

into that phase of capital proceedings "the entire panoply of criminal trial procedural rights." 430 U.S. at 358 n. 9, 97 S.Ct. at 1205 n. 9. Notably, there is no right to advance notice of witness statements, much less to evidence that merely corroborates such statements, in federal trials. Witness statements are not discoverable until after the witness has testified on direct examination. *See* 18 U.S.C. § 3500(a). This practice has, to our knowledge, never been found to offend the Due Process Clause. In light of the fact that *Gardner* expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, *Gardner* did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

The district court's justification for relying on *Gardner* is in error. In applying *Gardner* to the facts of this case, the district court cited a passage from *Smith v. Estelle*, 602 F.2d 694 (5th Cir.1979), *aff'd on other grounds*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in which the Fifth Circuit reasoned that "[s]urprise can be as effective as secrecy in preventing effective cross-examination" and thus denying defense counsel the opportunity to challenge prosecution evidence. *Id.* at 699. The *Estelle* decision was based on *Gardner*. *Estelle*, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. *See Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Extending the holding of *Gardner*, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the *Estelle* court may have been free to make that leap in extending *Gardner*, such analysis is no longer permissible on collateral review. *See Caspari*, — U.S. at —, 114 S.Ct. at 967.

Not only is petitioner's position not mandated by *Gardner*, but other precedent existing at the time his conviction became final counsels affirmatively against it. In *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the Supreme Court held that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* at 559, 97 S.Ct. at 846. As *Weatherford* explains, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), created a constitutional right to exculpatory evidence, but not to all information that might be helpful in preparing for trial. 429 U.S. at 559, 97 S.Ct. at 845; *see also United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 2400–01, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense."). Here, the prosecution had already responded to the *Brady* segment of the pre-trial discovery order when the defense requested the penalty evidence. Beyond that, *Weatherford* reiterates, " 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " 429 U.S. at 559, 97 S.Ct. at 846 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973)). The federal circuits have taken their cue from this precedent and have narrowly construed the requirements of due process in the context of discovery challenges. *See e.g., United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986); *United States v. Kendall*, 766 F.2d 1426, 1440–41 (10th Cir.1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir.1980). Thus, rather than deeming petitioner's claim to be iron-clad, a reasonable jurist might well have found that the Supreme Court and several circuits had affirmatively rejected arguments similar to petitioner's.

The practical import of the rule sought by petitioner underscores its novelty. If the Due Process Clause entitled defendants to some minimum advance notice of ancillary evidence, federal courts would be thrust deep into state criminal proceedings. The general scope of discovery at such trials, however, represents precisely the type of question that has traditionally been left to the states. *See Herrera v. Collins*, — U.S. —, —, 113 S.Ct. 853, 864, 122 L.Ed.2d 203 (1993). Here, for instance, the prosecution notified the defense of its penalty evidence, including

Gray's incriminating statements, not pursuant to any perceived mandate of due process but according to Virginia's "preferred practice." *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d at 526 (prosecution may proffer evidence of unadjudicated criminal conduct to show future dangerousness, but "[i]n fairness to the defendant ... the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty"). State practices of criminal procedure are reviewed on habeas with substantial deference. *Herrera*, — U.S. at —, 113 S.Ct. at 864. Indeed, the doctrine announced in *Teague* and developed in its progeny is based in part on comity in federal-state relations. *See Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (noting detrimental impact on states of retroactive application of new rules of constitutional law on habeas corpus). To supplant Virginia law on the particulars of criminal discovery with the Fourteenth Amendment, and increase the present discovery obligations on the state, is something we may not do on collateral review. *See Penry v. Lynaugh*, 492 U.S. 302, 314, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989) (noting that new rule is one which imposes additional duties on the states).

Finally, petitioner's contention rings hollow on its facts. The prosecution informed the defense on Monday morning that it intended to present evidence of statements by Gray that would implicate him in the Sorrell murders. That testimony was, of course, the linchpin of the government's proof of those crimes. Knowledge of the particular evidence the prosecution would offer to support that testimony, i.e., to show that the murders actually occurred, was simply not necessary to prepare a defense against the general charge of petitioner's guilt. Petitioner has advanced no meaningful way in which he would have proceeded any differently at the penalty phase had he known about the photographs, the autopsy report, and the like, before Thursday evening; indeed, it seems likely that petitioner's case would have unfolded in much the same fashion that it did.[3] *Accord Weatherford*, 429 U.S. at 561, 97 S.Ct. at 846.

For the foregoing reasons, petitioner is not entitled to habeas relief on the ground that he did not receive sufficient notice of the evidence in question.[4]

III.

Petitioner offers several alternative grounds for affirming the issuance of the writ. We find none persuasive.

[5] First, petitioner contends that the state court's refusal to appoint a private investigator for the defense contravened due process. The Supreme Court, however, has flatly declined to address the question whether, "as a matter of federal constitutional law[,] what if any showing would [entitle] a defendant to [private] assistance." *Caldwell v. Mississippi*, 472 U.S. 320, 323–24 n.1, 105 S.Ct. 2633, 2637 n.1, 86 L.Ed.2d 231 (1985). By resolving that question, we would clearly be breaking new constitutional ground. *See Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (declining to address same question). In any event, petitioner has offered

3. Petitioner devotes extensive portions of his brief to Timothy Sorrell's status as an initial suspect in the Sorrell murders, arguing that had he known of that fact he could have better defused the charge leveled against him. We refuse to be dragged into a mini-trial on the respective strengths of the cases against Sorrell and petitioner. Our sole commission on collateral review is to review the state trial record for violations of federal law. *See* 28 U.S.C. § 2254(a). Once we have satisfied ourselves that no such error occurred, we are not at liberty to reconduct state proceedings on federal habeas corpus. As the Supreme Court noted in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), state trials on the merits should be "the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.* at 90, 97 S.Ct. at 2508.

4. Petitioner's claim does not begin to approach either of the excepted categories that permit relief on the basis of novel doctrine. The rule petitioner seeks to establish would not place private conduct beyond the scope of lawful prosecution. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990) ("The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule [petitioner seeks]."). Nor is the rule fundamental to our system of ordered liberty. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

nothing more than a bare assertion that private assistance would have been beneficial to him, which does not state a violation of due process. *Caldwell*, 472 U.S. at 323–24 n. 1, 105 S.Ct. at 2637 n.1.

[6] Next, petitioner argues that the evidence at the guilt phase of the trial was insufficient to convict him of capital murder. He complains, in essence, that there was no direct evidence that he fired the fatal shots. However, a rational juror could well have found beyond a reasonable doubt that Gray was the triggerman. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The jury heard Tucker testify unequivocally that Gray shot McClelland, and the jury also heard testimony from two other witnesses that Gray said he murdered McClelland. Moreover, the prosecution showed that Gray, not Tucker, was acquainted with McClelland, and that Gray was angry with McClelland for firing his wife. The evidence established an ample basis for Gray's conviction.

[7] Last, petitioner asserts that the district court erred in dismissing as procedurally defaulted two other claims: that the prosecution failed to fully disclose impeachment evidence regarding a prosecution witness, Jeremiah Smallwood, and that Smallwood perjured himself. Because petitioner did not raise these arguments in the Virginia courts either at trial or on direct appeal, they would be procedurally barred from state collateral review. *Fitzgerald v. Bass*, 6 Va.App. 38, 46–50, 366 S.E.2d 615, 620–21 (1988), *cert. denied*, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). The claims are thus likewise barred from federal habeas review, absent a showing of cause and prejudice. *Teague*, 489 U.S. at 298–99, 109 S.Ct. at 1068–69; *Wainwright v. Sykes*, 433 U.S. 72, 87–91, 97 S.Ct. 2497, 2506–09, 53 L.Ed.2d 594 (1977). Petitioner's sole argument on that score is that the prosecution's failure to remit all the impeachment evidence precluded him from raising that claim at trial or on appeal, because he could not have known that the disclosure was incomplete until the omitted evidence became available. This does not justify petitioner's failure to allege the issue in state court, however, because at the time the state habeas petition was filed, petitioner's counsel possessed the relevant material but did not assert the claim. *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S.Ct. 1454, 1471, 113 L.Ed.2d 517 (1991).

IV.

The judgment of the district court is hereby reversed and the case is remanded with directions that the petition be dismissed.

REVERSED AND REMANDED.

K.K. HALL, Circuit Judge, concurring:

I join in all of the majority's opinion except for Section II–B, in which the majority concludes that Gray's due process challenge to the sentencing jury's finding of future dangerousness is procedurally barred by the "new rule" doctrine. Although I express no opinion as to the precise rule Gray seeks or whether it would indeed be a "new" one for *Teague* purposes, I believe that it is at least arguable, were we to grant the relief requested, that the rule to emerge would have been dictated by *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In *Gardner*, Justice Stevens noted that a defendant has "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* at 358, 97 S.Ct. at 1205 (*citing Witherspoon v. Illinois*, 391 U.S. 510, 521–23, 88 S.Ct. 1770, 1776–78, 20 L.Ed.2d 776 (1968)). Where, as here, a habeas petitioner complains that he has been intentionally and unfairly ambushed by the state's belated disclosure of the scope of the evidence to be introduced against him at sentencing, *Gardner* teaches us that it is not enough to conclude that earlier notice would have rendered his defense only marginally more effective; we must instead inquire whether the prosecution has met its affirmative obligation to act with integrity—in other words, to play fair.

I do not say that habeas petitioners alleging a due process violation may avoid the *Teague* bar in every case simply by asserting that the state has not "played fair"; the rule in *Gardner*—whatever it may be—is not so broad. However, by narrowly articulating the rule Gray seeks as "a constitutional entitlement to adequate advance notice of particular items of evidence," *ante* at —— (emphases deleted), the majority has very likely fallen into the trap described in *Turner v. Williams*, 35 F.3d 872 (4th Cir.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995). In *Turner*, we warned that the extant rule for *Teague* purposes will not often be "the most specific conclusion or holding [the petitioner] hopes we reach." *See id.* at 883 (emphasis in original deleted); *see also Ostrander v. Green*, 46 F.3d 347, 354 (4th Cir.1995) (framing "rules" too narrowly permits respondents to erect the *Teague* bar in almost every case).*

Although the majority correctly notes that if the respondent pleads the *Teague* procedural bar, a court must resolve the issue prior to considering the merits of the claim, *ante* at —— (*citing Caspari v. Bohlen*, —— U.S. ——, ——, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994)), there is no reason to address the *Teague* issue where the denial of relief may rest upon an alternative procedural ground. In the instant case, the district court ordered an evidentiary hearing to develop the facts respecting the state's presentation of the Sorrell murder evidence; the court then granted relief based on the evidence adduced at the hearing.

Because Gray clearly failed to request that evidence regarding this matter be taken by the state habeas court, I would hold his claim to be procedurally barred by the rule in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–13, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992). Under *Tamayo-Reyes*, a petitioner who has failed to develop the evidentiary record in his state proceeding must demonstrate cause and prejudice as a prerequisite for receiving a federal hearing. Because Gray has failed to satisfy the cause-and-prejudice standard, the district court was powerless to grant his petition on the basis of newly developed facts.

* We have previously stated that "[b]ecause *Teague* and its Supreme Court progeny ... have sent somewhat inconsistent signals, the circuit courts have had difficulty in coherently following these cases." *Turner*, 35 F.3d at 887 n. 16 (*quoting* 8C James W. Moore et al., *Moore's Federal Practice*

FILED
AUG 25 1994
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COLEMAN WAYNE GRAY,)
Petitioner,)
v.) Civil Action No. 3:91CV693
CHARLES E. THOMPSON,)
Respondent.)

MEMORANDUM OPINION

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.[1]

On May 26, 1993, the Court issued a Memorandum Opinion which granted in part, and denied in part, the Petitioner's Motion to Alter or Amend Judgment. An evidentiary hearing was ordered on one claim: whether the introduction of evidence pertaining to the Sorrell murders during the penalty phase of Gray's trial violated the Petitioner's Fourteenth Amendment right to due process.

The parties filed briefs on this issue, and the Court held an evidentiary hearing on April 21-22, 1994. The case now is ripe for adjudication.

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[1] Mr. Gray also was convicted of Use of a Firearm in the Commission of Murder. He was sentenced to four (4) years imprisonment on this charge.
The claim of error addressed in this Memorandum Opinion relates only to Gray's capital murder charge, and does not affect his other conviction.

APPENDIX B

I.

The facts surrounding the crimes for which petitioner Gray was convicted are set forth in the Supreme Court of Virginia's opinion on direct review, Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, cert. denied 484 U.S. 873 (1987), and in this Court's April 1, 1993 Memorandum Opinion. The salient details may be summarized as follows:

Richard McClelland, the manager of a Murphy's Mart Store in Portsmouth, Virginia, worked from 10:00 a.m. into the evening on May 2, 1985. That night at approximately 9:30 p.m., Coleman Gray and Melvin Tucker parked outside the convenience store. Both were "high" from "free basing" cocaine, and they watched McClelland and a security guard work for a significant period of time.

Shortly before midnight, McClelland and the security guard left the store. Each man got into his own automobile, and both drove to a nearby fast-food restaurant. Gray and Tucker followed the men to the restaurant. McClelland walked inside the establishment to eat; the security guard proceeded to the "drive thru" and picked up his food.

After finishing, McClelland returned to his car, and began driving towards Smithfield, Virginia. Gray and Tucker resumed their pursuit. At a stop sign on the corner of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his car in front of McClelland's and blocked the roadway. Gray, who was brandishing a .32 caliber revolver, forced McClelland out of his car, into Gray's car, and took the victim's wallet. Gray and Tucker then drove McClelland back to the Murphy's Mart Store.

Upon arrival, Gray forced McClelland to open the store. Tucker remained in Gray's car. The two men inside the store opened the safe and filled three bags full of money. After transferring the cash to Gray's car, the men forced McClelland back into the automobile.

Gray then drove to a service station to fill up his car with gasoline. The Petitioner also filled up a gas can which he placed in the trunk of his car. After paying for these purchases, Gray drove to the Frederick Campus of Tidewater Community College. The Petitioner turned onto a side road near the college, and ordered McClelland out of the car. The store manager walked fifteen to twenty feet away from the car, and, pursuant to Gray's order, laid face down on the ground. McClelland begged Gray not to shoot him or harm him in any way. After reassuring McClelland, Gray fired six shots in rapid succession into McClelland's head.

Gray and Tucker then returned to the intersection where McClelland's car was located. In order to destroy this evidence, Gray took the can of gasoline out of his trunk, and covered McClelland's car. After igniting the fire, the pair returned to Gray's apartment to count the money they had stolen.

Several days later, Tucker took Gray to the Nansemond Treatment Plant, where he worked. Gray threw the revolver he had used to kill McClelland into a contact tank. (Gray later showed the police where he had discarded the evidence and the gun was recovered.)

The police discovered McClelland's body only a few hours after the grisly murder. The autopsy revealed that six close-range .32

caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. See Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. See Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] Tr. of 4/21/94 at 76-77.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. Id. at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. See Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to

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[2] None of the Sorrell murder evidence was available for examination.

prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. Tr. of 4/21/94 at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. Jt. App. Vol. 1 at 278. Moore based his request on Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of statements Coleman Gray had made about other crimes he had committed. Jt. App. Vol. 1 at 279. The following conversation transpired:

> Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument. . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.
>
> Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record. . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.
>
> The Court: Who is the other murder that we're taking about?
>
> Mr. Ferguson: A murder in California.
>
> The Court: Any name?
>
> Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder. . .The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.
>
> Mr. Moore: Is it going to be evidence or just his statement?
>
> Mr. Ferguson: Statements that your client made.
>
> Mr. Moore: Nothing other than statements?
>
> Mr. Ferguson: To other people, that's correct. Statements made by your client that he did these things.

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. Tr. of 4/21/94 at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. Id. at 97. She had been shot in the head six times by a .32 caliber

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[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. Tr. of 4/21/94 at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. Id. at 248.

firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. See Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. Jt. App. Vol. 11 at 996-1001; Tr. of 4/21/94 at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain **statements** made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the

[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. Tr. of 4/21/94 at 120.

cause of death and the nature and extent of the Sorrell's injuries.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. Tr. of 4/21/94 at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. Jt. App. Vol. II at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. Id. at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. Id. at 1056-78; See Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell,

the victim's husband, was the primary and only suspect in the case for a substantial period of time. Tr. of 4/21/94 at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Id. at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. See Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. Id. at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Id. at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. See Pet. Ex. 1-2; Tr. of 4/21/94 at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week

prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. Tr. of 4/21/94 at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Id. at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. Id. at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. Tr. of 4/21/94 at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." Id. at 218, 238. Such an assertion is patently absurd.[5]

Finally, Dr. Presswalla, the state medical examiner who performed the victims' autopsies, testified as to the victims' cause of death. Jt. App. Vol. II at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished

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[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. Tr. of 4/21/94 at 409.

in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. Tr. of 4/21/94 at 66-67, 86-87; Jt. App. Vol. II at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. Jt. App. Vol. III at 1137-38. Gray flatly denied any involvement in the Sorrell murders.[4] Id. at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman

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[4] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. Tr. of 4/21/94 at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. Gregg v. Georgia, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); Hutchins v. Garrison, 724 F.2d 1425, 1429 (4th Cir. 1983). The state's act of taking the life of a citizen differs dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114 (1987); California v. Brown, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his

penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. See Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. Presnell v. Georgia, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); Gardner, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994) (citing Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); Balwin v. Hale, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. Gardner v.

Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing - that the Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla - violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. See, e.g., Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in Smith v. Estelle, "Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the truth-seeking function of trials.'" 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray

to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. See, e.g., Profitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed

upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); Richardson v. Johnson, 864 F.2d 1536 (11th Cir. 1989). As the Gholson court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced presented. 674 F.2d at 738 (citing Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. United States v. Manbeck, 744 F.2d 360, 392 (4th Cir. 1984); Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's

witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. See Gardner, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States

Constitution. The Commonwealth failed to give fair notice of its intention to prove, at the penalty phase of the McClelland trial, that Gray committed two distinct murders with which he had not been arrested for, charged or convicted. Absent the surprise introduction of the Sorrell murder evidence, there is a substantial probability that the result of Gray's sentencing would have been different. Accordingly, the Court will GRANT Coleman Gray a writ of habeas corpus, VACATE the Petitioner's death sentence, and REMAND the cause to the Circuit Court of the City of Suffolk in order that the Petitioner can be resentenced.

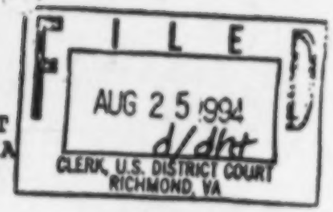
An appropriate Final Order shall issue.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: AUG 25 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



COLEMAN WAYNE GRAY,

Petitioner,

v.

CHARLES E. THOMPSON,

Respondent.

Civil Action No. 3:91CV693

FINAL ORDER

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.

For the reasons stated in the accompanying Memorandum Opinion, the Court hereby ADJUDGES and ORDERS that Mr. Gray's petition for habeas corpus relief is hereby GRANTED in the following respect:

The sentence of death imposed on January 27, 1986 by the Circuit Court of the City of Suffolk, Virginia, in accordance with the December 6, 1985 verdict of that Court, is declared NULL and VOID. The Commonwealth of Virginia shall, within one hundred and eighty (180) days of this date, provide the Petitioner with a sentencing hearing pursuant to the Procedures set forth in Va. Code Ann. 19.2-264.3 and any other applicable statute.

Unless an appeal from this Final Order is taken to the United States Court of Appeals for the Fourth Circuit within thirty (30)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 25, 1995

No. 94-4009
CA-91-693-R

COLEMAN WAYNE GRAY

Petitioner - Appellee

v.

CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center

Respondent - Appellant

No. 94-4011
CA-91-693-R

COLEMAN WAYNE GRAY

Petitioner - Appellant

v.

CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

APPENDIX C

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

APPENDIX D

this investigation. I respectfully request permission for him to sit at counsel table.

THE COURT: No problem.

MR. McLEES: Secondly, may I ask the Court, what is the status of our second motion for summary judgment?

THE COURT: It has not been granted. Really, you all have been, I guess, kind of fighting about the parameters of what the hearing is all about, and I would just simply explain to you in these terms. The way I look at this, the primary problem that I am concerned about and that I am going to look at closely is the notice that was given, the opportunity for cross-examination regarding the Sorrell murder issues, and this is not so much about determining whether or not Mr. Gray was responsible for the Sorrell murders. If the prosecution had exculpatory information that went in another direction and was not turned over, that impacts on any due process violation that would flow from the insufficient notice. So that kind of information would be helpful. As I say, we are not trying the Sorrell murders. I want everybody to understand that clearly.

Now, the issue of reliability is relevant, and I

APPENDIX E

think in some of the papers there was, I think, a misunderstanding of credibility versus reliability. I am not testing whether or not when this person testified, the jury had the right to believe what he said. The question is whether or not the information, the body of information was sufficiently reliable to be allowed under the Constitution.

So I put it to you that way, so that you will understand what we are trying to hear here today. Mr. McLees, do you have anything else?

MR. McLEES: Yes, sir. The Court having said that, I ask respectfully that the record reflect my objection. The issues that Your Honor has identified here today, the question of notice given and the opportunity for cross-examination and whether there was exculpatory information that was not turned over, I think were addressed in previous pleadings, and for various reasons, we have argued that they are procedurally barred and they are meritless and they simply do not establish grounds for federal habeas corpus review.

THE COURT: I understand your arguments and your objections will be noted. Just let me say this: If in fact I were to determine that the Commonwealth had information indicating that somebody

else committed these murders, did not inform the defense of that, they never had an opportunity to challenge the information, it went forward, as far as I'm concerned, that sentencing hearing would have been constitutionally inadequate. And you all can make your objections and you can appeal until somebody agrees with you, but if that is my finding, you will lose. I will tell you that straight up. I just can't imagine a circumstance less fair. I mean, this is a person fighting for their life, and you have information that indicates that somebody else might have committed the murder, and you have information that Mr. Gray might have committed the murder, fine. If you tell the defense lawyers about it and let it be hashed out and the jury believes that Mr. Gray committed it, fine. I would have no problem with that. But the circumstance that I have -- and I don't know that that is the situation, obviously. But I'm just telling you, that to me would just be terribly unfair, constitutionally unfair.

MR. McLEES: I understand Your Honor's position. If I may express one other brief objection. That is, in a procedural vein, about ten months ago when Your Honor first ordered this

hearing, we expressed to counsel and then to the Court in various ways on the telephone and in letters and in pleadings our belief that there was a need for clarification of the issues that would be addressed at this hearing. And the only response we got from all of that was ultimately in Your Honor's order denying our first motion for summary judgment, we understood the issue to be honed in the Court's words to the reliability in fact of relevant testimony for the Sorrell murders evidence. And the other issues that were BRADY claims and the other peripheral procedural issues have been eliminated in the Court's April 1st order of last year. We have prepared a case. Our evidence that we prepared tomorrow is primarily focused on establishing that Mr. Gray did in fact commit the Sorrell murders, and therefore, Mr. Tucker's testimony was reliable and it was true. And to be told on the morning of the hearing that the issue is something else than what we have understood for almost a year and what the Court identified in its order, I think, doesn't give us fair notice. I respectfully object.

THE COURT: Now, Mr. McLees, I will certainly do this. If you feel like you don't have sufficient notice of what the hearing is really abo

to him coming to the house. The point about the jeans, she indicated to me that the jeans were soaked from the knees down. They were wet. They were soaking wet.

She went on to tell me about Slezak. They were very close, to the point that Detective Slezak may have even encountered some kind of flack or grief from his department because they exchanged information on a daily basis.

Other points, she indicated that there were bullet fragments found in the rear of the automobile.

Q Did Mrs. Nixon indicate that she had learned anything from Detective Slezak concerning the crime; that he had provided her with any information that he had concerning the Sorrell murders?

A He had provided them with information concerning there was some form of paint maybe used, that a money order had been purchased. He advised them of the stop at Wendy's because of, I guess, Certificate of Analysis. Give me a moment to remember.

Q Was anything said concerning the United States Navy, any installation?

A Yes, there were a lot of conversations concerning Timothy's employment. It seems their son,

Cary Nixon, had assisted Timothy in getting employment with the Naval Exchange. In less than six months, Timothy had become a supervisor of the Naval Exchange. During that time period, a major theft ring existed at the exchange. It seemed like Timothy was a participant or associated with the participan in this ring.

Lisa had become disturbed because there was a visit a week prior to her death from a gentleman either possessing stolen merchandise or in conversation with Timothy concerning stolen merchandise. Lisa had brought this to the attention of her mother, and shortly after the death of Lisa, the Nixons provided this information to Detective Slezak. From what they had indicated to me, Detective Slezak, Chesapeake Police Department, had confiscated this merchandise from an uncle of Timothy Sorrell's.

Q Was there any information that Ms. -- strike that. Did Mrs. Nixon ever indicate to you that either she to Detective Slezak, she or her husband, or Detective Slezak to her ever suggested who might be responsible for the Sorrell murders?

A Yes. They felt Timothy Sorrell was responsible for the murder, very strongly, from his actions

coming in the door the night of the fifth crying, throughout various points of nervousness and not carrying on his normal activities. It seems from that point, he and his brother began to associate very closely, always going places together.

Q Did Mr. and Mrs. Nixon ever mention to you that they had discussed with Detective Slezak anything to do with drugs?

A I can't recall anything to do with drugs from a conversation with the Nixons.

Q Is there anything else with respect to the evening of December 5th, 1985 -- excuse me, 1984, that you can recall as to Timothy's activities that evening, the Nixons said that they discussed with Detective Slezak?

A Another point that was raised, Timothy had basically, or he was under the pretense that he was at school on that evening. Detective Slezak had verified that he was not at school on that evening, but that he was at a female friend's home when he made the phone call, the 7 o'clock, 7:30 phone call.

Q Did you talk with Detective Slezak about this case?

A Yes. We had a brief interview with Detective Slezak at the Chesapeake Police Department.

THE DEFENDANTS further affirmatively allege that:

4. Timothy Sorrell is the husband of Lisa Sorrell and beneficiary under a life insurance policy issued by Prudential Insurance Company of America insuring the life of Lisa Sorrell (Policy No. RS-014-697).

5. Timothy Sorrell is not entitled to receive the proceeds of the insurance policy bacause on information and belief, he caused the death of Lisa Sorrell and is currently under investigation by the Chesapeake Police Department.

6. It is anticipated that an indictment will be issued for Timothy Sorrell for the murder of Lisa Sorrell in the very near future and that Timothy Sorrell will be convicted of the murder of Lisa Sorrell.

7. Brenda Nixon was instrumental in the procurement of the life insurance policy in that she contacted Prudential Insurance Company in October of 1984, arranged the initial meeting between Lisa Sorrell and the insurance agent, and finally, paid the initial premium on the policy.

8. According to Virginia law, Timothy Sorrell is barred from any participation in the proceeds of the insurance policy because of his participation in the death of Lisa Sorell.

WHEREFORE, the Nixons' ask for the following relief:

1. An order barring Timothy Sorrell from receiving any of the proceeds from the insurance policy on the life of Lisa Sorrell.

LAW OFFICES
SACKS & SACKS
NORFOLK VIRGINIA

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Complainant

vs.

COLEMAN WAYNE GRAY — Defendant

MOTION

I. The accused, Coleman Wayne Gray, by counsel, hereby moves the court, pursuant to Rule 3A:11 of the Rules of the Supreme Court of Virginia, to direct that the Commonwealth's Attorney for the City of Suffolk, Virginia permit the inspection and copying of the following:

a. Any and all written or recorded statements or confessions made by the accused, or copies thereof, and any and all tape recordings made of said statements or confessions, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, that are known by the Commonwealth's Attorney to be in the possession, custody, or control of the Commonwealth, whether such statements and/or confessions be inculpatory or exculpatory.

b. Any and all real and physical objects which are relevant to the charges of:

1. possession of marijuana;
2. possession of a controlled drug, to-wit: marijuana, with the intent to distribute;
3. robbery;
4. abduction;
5. arson;
6. capital murder;
7. three charges of use of a firearm while committing or attempting to commit murder, robbery and abduction;
8. possession of cocaine;

brought against the accused for alleged acts on or about May 3, 1985; the identity of the perpetrator of these crimes; and the investigation

Petitioner's Exhibit Number 11 3:91CV693

of these crimes, any of which evidence would be exculpatory in regards to the accused and/or which would be material and necessary for the preparation of the defense of the accused, and which is known by the Commonwealth's Attorney to be within the possession, custody or control of the Commonwealth, including, but not limited to, any real and physical objects found at the scenes of the alleged crimes which would be exculpatory in regard to the accused and/or be inculpatory as to other individuals, whether or not such individuals are charged with said alleged acts.

c. Any and all reports of autopsies, ballistic tests, fingerprint analysis, handwriting analysis, hair, blood, urine and breath tests, psychiatric reports of the accused, or other scientific reports, and any and all police and investigative reports and records, which is known by the Commonwealth's Attorney to be within the possession, custody or control of the Commonwealth, and which said reports were made in connection with the charges against the accused, Melvin G. Tucker, and/or Melinda B. Gray, or others.

d. Any and all statements or confessions made by Melvin G. Tucker, Melinda B. Gray, or any other suspect or individual, which statements or confessions may be exculpatory in regard to the accused and/or which would be material and necessary for the preparation of the defense of the accused, including, but not limited to, said statements which would show inconsistencies in said statements and tend to effect the credibility of said statements or the testimony of said individuals.

e. Any and all real or physical objects or substances within the categories described by paragraphs a., b., c., or d., which hereafter come into possession, custody or control of, or become known to the Commonwealth's Attorney, or to the Police Department of the City of Suffolk, Virginia.

II. The accused further moves this Honorable Court pursuant to said Rule For an Order directing the Commonwealth's Attorney for the City of Suffolk, Virginia to file a written bill of particulars particularizing the following:

a. Whether the Commmonwealth is proceeding against the defendant as a principal in the first or second degree in the capital

murder charge pending against the defendant under Virginia Code Section 18.2-31;

b. Any and all promises or agreements made to Melvin G. Tucker or Melinda B. Gray, which promises or agreements result in the said Tucker and/or Gray testifying against the accused at trial;

c. The name and address of the informant referred to in a search warrant applied for by Carl Lilley on May 5, 1983 at 2250 hours to search the apartment of the accused.

COLEMAN WAYNE GRAY

By: James A. Moore
Counsel

Carl E. Eason
Counsel

James A. Moore
Moore & Saunders
705 W. Washington Street
Suffolk, Virginia 23434
Counsel for Defendant

Carl E. Eason, Jr.
Pretlow, Eason & Pretlow
P. O. Box 1037
104 Western Avenue
Suffolk, Virginia 23434
Counsel for Defendant

CERTIFICATE OF MAILING

We hereby certify that a true copy of the foregoing Motion was mailed this 22nd day of October, 1985 to C. Phillips Ferguson, Commonwealth's Attorney, P. O. Box 1811, Suffolk, Virginia 23434.

James A. Moore

Carl E. Eason, Jr.

pac6

FILED THIS THE 22 day of October 1985 000792

Teste: HENRY C. MUNDEN, CLERK
By: Cheryl O. Conner D.C 10:20 A.M. 41-D

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Plaintiff

vs.

COLEMAN WAYNE GRAY — Defendant

MOTION

COMES NOW the defendant, Coleman Wayne Gray, by counsel, James A. Moore and Carl E. Eason, Jr., and moves this Honorable Court for the appropriation of funds to the defendant for the employment of an independent investigator to assist in the preparation of the defense of Coleman Wayne Gray in the charges pending against him, or in the alternative, the defendant moves for the appointment by this Honorable Court of an independent investigator to assist the defendant in his preparation of his defense in the charges pending against him, said investigatory assistance deemed necessary for an effective and complete defense.

COLEMAN WAYNE GRAY

By: James A. Moore
Counsel

Carl E. Eason
Counsel

James A. Moore
Moore & Saunders
P. O. Box 948
Suffolk, Virginia 23434

Carl E. Eason, Jr.
Pretlow, Eason & Pretlow
P. O. Box 1037
Suffolk, Virginia 23434

Appeal Noted 8-7-85

Motion denied
5/7/87
Tim. M. Kelly

Petitioner's Exhibit Number 13 3:91CV693

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CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing document was mailed this 27th day of June, 1985 to C. Phillips Ferguson, Commonwealth's Attorney, P. O. Box 1811, Suffolk, Virginia 23434.

Carl E. Eason, Jr.

disc. pac/85-165/CEE

PRETLOW EASON & PRETLOW
ATTORNEYS AND COUNSELLORS AT LAW
COLONIAL BUILDING
SUFFOLK VIRGINIA

000799

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Plaintiff

vs.

COLEMAN WAYNE GRAY — Defendant

M O T I O N

COMES NOW THE defendant, Coleman Wayne Gray, by court-appointed counsel, James A. Moore and Carl E. Eason, Jr., and moves this Honorable Court for the appropriation of funds to the defendant for the employment of an independent investigator to assist in the preparation of the defense of Coleman Wayne Gray in the charges pending against him, or in the alternative, the defendant moves for the appointment by this Honorable Court of an independent investigator to assist the defendant in his preparation of his defense in the charges pending against him, said investigatory assistance deemed necessary for an effective and complete defense, pursuant to Virginia Code Section 19.2-163.

The defendant further moves this Court for the appropriation of funds to the defendant to secure certain and particular statistical reports and surveys which the defendant deems necessary for an effective and complete defense to the charges pending against him pursuant to Virginia Code Section 19.2-163.

COLEMAN WAYNE GRAY

BY: James A. Moore
Counsel

Counsel

James A. Moore
Moore & Saunders
P. O. Box 948
Suffolk, Virginia 23434

PRETLOW EASON & PRETLOW
ATTORNEYS AND COUNSELLORS AT LAW
COLONIAL BUILDING
SUFFOLK VIRGINIA

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Petitioner's Exhibit Number 14 3:91CV693

caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. See Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. See Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] Tr. of 4/21/94 at 76-77.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. Id. at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. See Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to

[2] None of the Sorrell murder evidence was available for examination.

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prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. Tr. of 4/21/94 at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. Jt. App. Vol. 1 at 278. Moore based his request on Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of statements Coleman Gray had made about other crimes he had committed. Jt. App. Vol. 1 at 279. The following conversation transpired:

> Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument. . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal

[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. Tr. of 4/21/94 at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. Id. at 248.

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purposes. It's absolute dynamite.

Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record. . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.

The Court: Who is the other murder that we're taking about?

Mr. Ferguson: A murder in California.

The Court: Any name?

Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder. . .The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.

Mr. Moore: Is it going to be evidence or just his statement?

Mr. Ferguson: Statements that your client made.

Mr. Moore: Nothing other than statements?

Mr. Ferguson: To other people, that's correct. Statements made by your client that he did these things.

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. Tr. of 4/21/94 at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. Id. at 97. She had been shot in the head six times by a .32 caliber

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firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. See Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. Jt. App. Vol. II at 996-1001; Tr. of 4/21/94 at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain statements made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the

[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. Tr. of 4/21/94 at 120.

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cause of death and the nature and extent of the Sorrell's injuries.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. Tr. of 4/21/94 at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. Jt. App. Vol. II at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. Id. at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. Id. at 1056-78; See Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell,

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the victim's husband, was the primary and only suspect in the case for a substantial period of time. Tr. of 4/21/94 at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Id. at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. See Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. Id. at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Id. at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. See Pet. Ex. 1-2; Tr. of 4/21/94 at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week

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prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. Tr. of 4/21/94 at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Id. at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. Id. at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. Tr. of 4/21/94 at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." Id. at 218, 238. Such an assertion is patently absurd.[5]

Finally, Dr. Presswalla, the state medical examiner who performed the victims' autopsies, testified as to the victims' cause of death. Jt. App. Vol. II at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished

[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. Tr. of 4/21/94 at 409.

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in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. Tr. of 4/21/94 at 66-67, 86-87; Jt. App. Vol. II at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. Jt. App. Vol. III at 1137-38. Gray flatly denied any involvement in the Sorrell murders.[6] Id. at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman

[6] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

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Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. Tr. of 4/21/94 at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. Gregg v. Georgia, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); Hutchins v. Garrison, 724 F.2d 1425, 1429 (4th Cir. 1983). The state's act of taking the life of a citizen differs dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114 (1987); California v. Brown, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his

penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. See Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. Presnell v. Georgia, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); Gardner, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994) (citing Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); Balwin v. Hale, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. Gardner v.

Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing - that is Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla - violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. See, e.g., Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in Smith v. Estelle, Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that debate between adversaries [which] often is essential to the truth-seeking function of trials.'" 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray

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to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. See, e.g., Profitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed

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upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); Richardson v. Johnson, 864 F.2d 1536 (11th Cir. 1989). As the Gholson court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced presented. 674 F.2d at 738 (citing Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. United States v. Manbeck, 744 F.2d 360, 392 (4th Cir. 1984); Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's

witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. See Gardner, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States

REQUEST FOR APPOINTMENT OF A LAWYER

VA. CODE ANN. §§ 16.1-266, 267, 19.2-159, 160, 163

File No. C85-1391

☐ Circuit Court
~~☑~~ General District Court
☐ Juvenile and Domestic Relations District Court

Suffolk CITY OR COUNTY
Coleman Wayne Gray

Adult

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER—STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

5-23-85 (DATE) ~ Coleman W. Gray (ADULT)

The Court was advised that ....., a lawyer, has been retained to represent the accused in this Court. This information was provided by:

☐ the above-named person ☐ the lawyer ☐ .....

DATE ..... (JUDGE) (CLERK)

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

☐ the Adult is not indigent and not entitled to representation by a court-appointed attorney.

☐ the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel;

☐ the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

.....

.....

.....

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

5-31-85 (NEXT HEARING DATE AND TIME)

James A. Moore
134 N. Main St
Suffolk, Va

May 23, 1985 (DATE)

Charles B. Garnett (JUDGE)

File No. 15

REQUEST FOR APPOINTMENT OF A LAWYER

000078

REQUEST FOR APPOINTMENT OF A LAWYER

VA. CODE ANN. §§ 16.1-266, 267, 19.2-159, 160, 163

File No. C85-

☐ Circuit Court
~~☑~~ General District Court
☐ Juvenile and Domestic Relations District Court

Suffolk CITY OR COUNTY
Coleman Wayne Gray

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER—STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

5-31-85 (DATE) ~ Coleman Gray (ADULT)

The Court was advised that ..... to represent the accused in this Court. This information was provided by: ....., a lawyer, has been retained

☐ the above-named person ☐ the lawyer ☐ .....

DATE ..... (JUDGE) (CLERK)

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

☐ the Adult is not indigent and not entitled to representation by a court-appointed attorney.

☐ the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel;

☐ the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

.....

.....

.....

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

2-10-85 (NEXT HEARING DATE AND TIME)

Carl Edward Eason, Jr.
Colonial Bldg.
Suffolk, Va.

May 31, 1985 (DATE)

Charles B. Garnett (JUDGE)

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REQUEST FOR APPOINTMENT OF A LAWYER

File No. .....

000079

It's not so much sanity of the offense itself, it's the question of dangerousness in the future.

THE COURT: As to the first issue, of course he would not be entitled to a psychiatric examination unless there is some preliminary showing that he has some mental problem. As to the future dangerousness question, I'm going to allow it on that question. The Court will appoint a psychiatrist, and of course, it will be done prior to trial.

MR. EASON: Is the Court ready for the next motion?

THE COURT: Yes, sir.

MR. EASON: The next motion I would like to address to the Court is one simply filed as far as the document is concerned. The motion is where we are requesting appropriation of funds for the appointment of an independent investigator to assist the defendant and his attorneys in this case, and it is a two-pronged motion. Let me take up that first.

Your Honor, I am making this motion as somewhat of an analogy to Ake in the sense that some of the dicta or language used in Ake I submit is simply applicable to this motion also. First of all, if there is a question of statutory authority for the appointment of an independent investigator I submit that §19.2-163 allows for it when it says that an indigent defendant's intitled to court-appointed attorney plus other reasonable

assistance that's necessary for him, as is perhaps another analogy, a specific Federal Code section which also allows for the appointment directly of an independent investigator in criminal offenses. So, I don't think it's something of any new motion being made.

Again, Your Honor, in the Ake case, Ake v. Oklahoma, the Court said that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding it must take steps to insure that the defendant has a fair opportunity to present his defense.

The Court further stated that the basic tools of an adequate defense should be and will be allowed for any indigent defendant.

We submit to the Court that in this particular case one of these basic tools will be trying to locate, find, determine if there is any type of evidence available which, as Mr. Ferguson has characterized earlier, which may determine or assist the defendant in showing that he was not the man that killed Richard McClelland back in May.

I think it does become a question of who shot the man and there are two people at the moment who are probably going to be charged and tried on that matter.

We submit to the Court that the two defendants, the facts actually will show, knew each other before this action may have occurred and lived in the same area, the same community. We feel that, Mr. Moore and I feel as counsel for the defendant that we need assistance

in the form of an investigator, someone who has expertise in the role of going out, interviewing, discussing, talking with people in the community who may know anything about this case. The defendant's incarcerated. He can't help us. He doesn't even know the names of many, many of the people in the neighborhood. But, as the Court may well be aware, in many instances when crimes are committed there is obviously community rumors and talk about it after something occurs and in many instances accused individuals who are subsequently arrested may even discuss the matter themselves with other people in the community before they're arrested.

We submit to the Court that we need an investigator to assist us in trying to see if there are any such individuals in the community which we can locate and call as witnesses. Of course, he has two attorneys. We certainly realize that point. And the Court has bent over backwards in appointing two attorneys, I'm sure because of the severity of the case involved. But, being an attorney sometimes is a negative factor when it goes to interviewing witnesses in many senses. First of all, people don't like to talk to attorneys. Second, even if Mr. Moore or I were to perhaps be able to locate someone, get out on foot and locate some individuals and they tell us something, that we then think they are an appropriate witness for trial and then we bring them in to trial and they change their statements, or tell a different story in the courtroom, then

PAMELA H. ASKEW
COURT REPORTER
400 BUTLER AVENUE

it places us as defense counsel in a position of having to withdraw and having to testify as to prior inconsistent statements. It all boils down to a point that we do not feel as counsel for the defendant that we should be put in the position of going out and locating all the evidence. We're the ones who are supposed to be putting that evidence together and presenting it to the Court.

We believe an investigator appointed by the Court or funds allowed for that investigator would be appropriate to assist us and to assist this man. This is in our opinion a fairly complicated case, just in the sense of the number of witnesses involved and the sequence of events that are alleged to have occurred. We think that the defendant would certainly be at a disadvantage in not having some assistance in the form of potentially finding some individuals that may be of some use to the defense in presenting his defense at trial itself.

MR. MOORE: Your Honor, I perhaps would like to address just very briefly the second part of that same motion when we also ask for appropriation of funds to secure certain secular statistical reports and surveys which we deem necessary. That is, I admit, very ambiguous and I will tell the Court what I'm talking about right now.

As the Court is well aware, in the case of Turner v. Commonwealth, which is on appeal to the United

PAMELA H. ASKEW
COURT REPORTER
400 BUTLER AVENUE

States Supreme Court, I believe counsel in that case submitted some statistical reports from out-of-state surveys, out-of-state reports which showed perhaps any recial bias or prejudice which there may be when there is a black defendant charged with the murder of a white victim, vis-a-vis blacks killing blacks, or whites killing blacks or whites killing whites. And the Supreme Court of Virginia in that case said that that survey in and of itself, as the Court is well aware, that survey was not of any utility because it was an out-of-state survey or report. That certainly left open the question, we submit, as to whether the potential Virginia reports and/or surveys would be of some use in the Court making a decision upon voir dire as to the racial bias or prejudice of potential jurors.

We are asking for the ability to be able to secure reports along those lines which we would then intend to submit at the time of the voir dire in selecting the jury panel.

Your Honor, I have been in touch with a group, out-of-state group, who I have been informed by other counsel in the City of Suffolk, which potentially have those types of reports. Frankly, the man called me back yesterday while I was with the defendant over in the Hampton City Jail. I called him again this morning before I came to court and he was not in his office yet. It is my understanding that they have some of the reports that they can provide to us. I don't know

whether, frankly, there is any cost for those reports or exactly what it does entail as far as securing them. But, I'm asking the Court to allow us the ability to be able to secure those reports, to be able to submit to potentially show any racial bias once this matter does go to trial.

THE COURT: Well gentlemen, as far as the independent investigator is concerned, the Virginia Supreme Court has addressed itself to that problem and motion, of course, would be denied.

On the statistical information and reports question involved in the Turner case, the Turner case is on appeal before the Supreme Court of the United States, but it's on a question of voir dire to the jury, not on statistical information that was denied by the Court.

The Supreme Court addressed itself to that question and found no problem with it. So, I'm going to deny your motion for that. As far as the voir dire situation is concerned, we'll take that matter up at a later date on the question of voir dire.

MR. EASON: Your Honor, I have one other motion I believe that does not involve any evidence, and then we can get into the witnesses, and I will make this motion very brief, Your Honor.

This is just simply a motion to dismiss. Our position is that §18.2-31 under which the defendant is

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK
COMMONWEALTH OF VIRGINIA
VS.
COLEMAN WAYNE GRAY

MEMORANDUM

COMES NOW the Defendant, Coleman Wayne Gray, by Counsel, and submits unto this Honorable Court his Memorandum filed in conjunction with his Motion to Suppress heretofore filed, to be considered by the Court, together with testimony taken on November 7th, 1985, a copy of which transcript has been filed with this Court.

I S S U E S

I. Was the statement made by the Defendant to Detective William Freeman at 9:00 A.M. on May 22nd, 1985 and the statement made to Sergeant Carl Lilley on the same morning, made pursuant to a valid waiver of his Miranda rights, and additionally whether the statements, considering the totality of the circumstances peculiar to this individual Defendant, were made freely and voluntarily, pursuant to the Common Law Doctrine of Voluntariness.

II. Was the statement made by the Defendant to Sergeant Carl Lilley and Detective Bunker on May 23rd, 1985 made pursuant to a valid waiver of his Miranda rights, and additionally whether the statement, considering the totality of the circumstances peculiar to this individual Defendant, was made freely and volutarily, pursuant to the Common Law Doctrine of Voluntariness.

A R G U M E N T

The Defendant's statements made on May 22nd and May 23rd were both involuntary statements and therefore should be suppressed. The Court, in determining whether or not to suppress the statements, must consider each statement, and the circumstances surrounding it, separately. Therefore, this Memorandum will present arguments pertaining to the voluntariness of each, independent of the other.

This Memorandum will address each statement with a two-fold

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...rneys at Law
...d Washington Street
...K, VIRGINIA 23434

evidence seized at the scene. The United States Supreme Court has refused to find that a defendant who confesses, after being falsely told that his co-defendant has turned state's evidence, does so involuntarily. Oregon v. Elstad, 105 Sup.Ct. at 1297; Frazier v. Cupp, 394 U.S. 731, 739 (1969). Therefore, the mere fact that Sgt. Lilley told the defendant that he had his fingerprints and that he had recovered a cigarette butt from the scene does not render his confession involuntary.

The Suffolk Police did not threaten or coerce the defendant to make any of the statements he made. They made no promises or inducements to the defendant. The defendant chose on his own to make all the statements he made to the police. He voluntarily, knowingly and intelligently made that decision. The defendant made all the statements without any impropriety on the part of the Suffolk Police Department.

Conclusion

The defendant's Motion to Suppress is without merit. Therefore, the Commonwealth respectfully requests that all the statements made by the defendant be found to be admissible and that the defendant's motion be denied.

Respectfully submitted,

Nancy G. Parr
Assistant Commonwealth's Attorney

Filed this 4th day of Nov 1985
Teste: Henry C. Burden, Clerk
By Patricia A. Gray D.C.

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Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
E. EVERETT BAGNELL
JUDGE
P. O. BOX 1914
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
P. O. BOX 129
COURTLAND, VIRGINIA 23837

Fifth Judicial Circuit

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

November 19, 1985

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Commonwealth's Attorney
City of Suffolk
441 Market Street
Suffolk, Virginia 23434

James A. Moore, Esq.
Post Office Box 948
Suffolk, Virginia 23434

Carl Edward Eason, Jr., Esq.
Post Office Box 1037
Suffolk, Virginia 23434

Re: Commonwealth v. Coleman Wayne Gray

Gentlemen:

I have reviewed the transcript and the memoranda in the above-captioned matter on the Motion to Suppress. After considering all the facts submitted, the Court is of the opinion that the defendant, Coleman Wayne Gray, wanted to make a statement and did make a statement without any intimidation, inducements or promises. It was a voluntary statement made by him, after waiving counsel. He thoroughly understood his constitutional rights with regard to Miranda and the rights form. He had signed a rights form on a prior recent occasion, and had it explained to him again on the date of this statement.

After considering all the facts submitted, based on the law and the testimony of the witnesses, the Court finds that the statement was voluntary, and the Motion to Supress is overruled.

Yours very truly,

James C. Godwin
Judge

JCG/nsw

001291

262-BB

Q This is the letter from myself to Mr. Sacks, Mr. Tucker. I'm going to give you a copy of it to make sure that what I'm reading is accurate, all right sir?

Mr. Tucker, this letter states as follows, the letter from me to Mr. Andrew M. Sacks, your attorney:

"Dear Mr. Sacks:

This letter is in regard to the charges currently pending against your client, Melvin G. Tucker wherein Richard McClelland was the victim. Your client is currently charged with capital murder and robbery, abduction with intent to extort money or for pecuniary benefit, arson, and three counts of use of a firearm in the commission of a felony.

This is to confirm that your client has agreed to fully cooperate with the Commonwealth of Virginia and its investigators and prosecutors and to truthfully disclose all information with respect to the involvement and activities of himself and others concerning all matters related to this case and any other crimes or offenses about which he has knowledge, whether they occurred in Suffolk or in some other location.

It is understood that your client agrees to testify fully and truthfully at any trial or court proceeding of any co-defendant or other person with respect to any matters about which he has knowledge upon request of this office or any other prosecutors in any other jurisdictions.

It is understood that your client must at all times give complete, truthful, and accurate information and testimony. Upon your client complying with the forementioned terms of this agreement this office has agreed to the following:

(1) Melvin Tucker will be tried on a charge of first degree murder rather than capital murder.

(2) A. If Melvin Tucker pleads not guilty and is convicted before the Court, a judge trial, on the charges pending against him the Commonwealth agrees to

convey to the Court the nature and extent of Melvin G. Tucker's cooperation at the time of his sentencing.

B. If Melvin G. Tucker pleads guilty to the charges against him it it agreed that he shall receive a total sentence of a term of years subject to the approval of the sentencing judge.

(3) A. Pursuant to §19.2-270 of the Code of Virginia it is agreed that any statement or testimony given by Melvin G. Tucker in any hearings or trials of any co-defendants shall not be used against him in any way other than for purjury charges should Melvin G. Tucker not be truthful.

B. It is agreed that any statements made or information furnished by Melvin G. Tucker in connection with his cooperation with the authorities in this case as set forth in this letter shall not be used against him in any way other than for purjury charges should Melvin G. Tucker not be truthful.

C. It is further agreed that this office will not provide any information received after this date from your client pursuant to his cooperation to other prosecuting offices or agencies for the purpose of criminal prosecution of Melvin G. Tucker if he complies with this agreement.

(4) Should Melvin G. Tucker wish to be tried by a jury on his pending charges the Commonwealth agrees not to oppose a motion by Melvin G. Tucker for a change of venire and agrees to leave that issue to the sound discretion of the judge of the Circuit Court.

Should it be determined that your client has deliberately given false, incomplete or misleading information or otherwise violated any provision of this agreement your client shall thereafter be subject to prosecution for any criminal violation of which this office has knowledge, including but not limited to purjury and obstruction of justice. Further, the Commonwealth shall then not be bound by the terms of this agreement.

No additional promises, agreements, or conditions have been entered into other than those set forth in this letter."

Does this fully set forth the terms and conditions under which you have agreed to testify in this case?

A Yes, sir.

Q And you understand that for this agreement to be of any force and effect whatsoever you must testify fully, completely, and truthfully regarding this case both as to your own involvement as well as the involvement of Mr. Gray? You understand that?

A Yes, sir.

MR. FERGUSON: Your Honor, I would offer this letter into evidence as a Commonwealth's exhibit in these proceedings.

THE COURT: Mr. Ferguson, you have a number of witnesses who are in the courtroom. Do you need them?

MR. FERGUSON: These witnesses have already been excused, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON: I would ask that that be marked and introduced as a Commonwealth's exhibit.

MR. MURDEN, CLERK: "31".

MR. FERGUSON, Continuing-

Q Now Mr. Tucker, have you been previously convicted of any criminal offenses, felony criminal offenses?

A Yes, sir.

Q How many?

A One.

Q And what was that offense?

A Armed robbery.

Q All right. Other than that do you have any other prior convictions of felonies or crimes involving moral turpitude? I believe you have one petit larceny as a juvenile; is that correct?

A Yes, sir.

Q Other than those two offenses do you have any prior convictions of felonies or crimes involving moral turpitude?

A No, sir.

Q All right. Now Mr. Tucker, I'm going to ask you some questions relative to this case and I would ask that you speak so the members of the jury can hear you. Can all you hear, including the gentleman on the end down here?

Now Mr. Tucker, do you know the defendant in this case, Coleman Wayne Gray?

A Yes, sir.

Q And how long have you known Mr. Gray?

A Several months.

Q Allright. You mean several months prior to this particular incident involving Mr. McClelland?

A Yes, sir.

Q All right. Now Mr. Tucker, I want to take your attention back to May the 2nd, evening of May the 2nd and before that time. I want you to tell the members of the jury exactly how this situation came about and what occurred?

A I came over to the house one day, and--

Q When approximately was this that you went over, came over to Mr. Gray's house?

A I don't know what date it was, but one afternoon.

Q How far prior to, how much prior to this incident was it that you came over?

A It was inside a week, week-and-a-half.

Q Within a week-and-a-half?

A Yes, sir.

Q All right. When you came over to Mr. Gray's house what did you observe? What was happening?

A I came over for something, and he asked Linda-- he told me something about Linda had turned into a stick-up artist or something like that, and asked her to get a sketching of paper that she had drawed.

Q What kind of paper are you talking about?

A Sketching of Murphy's Mart.

Q All right. And so what happened after that? Who is Linda or Melinda?

A His wife.

Q All right. Go ahead.

A And they started discussing the areas in the store and the security at the store.

Q For what purpose?

A One purpose was to go in the store and hide until closing time.

Q And then do what?

A Then to rob the store afterwards.

Q All right. Now, as they were discussing this agreement where were you, or what they wanted to do, where were you?

A I was in their house.

Q All right. And what happened after that? Did they talk with you about the incident, about what they wanted to do?

A Yea; rob the store.

Q All right. And so what happened after that?

A After we were discussing that another day came around. We went over to his wife's--

Q Speak up.

A We went over to his wife's brother's house.

Q Okay.

A Was there getting high, and we left

that night.

Q What do you mean "getting high"?

A Free basing.

Q What does free basing mean?

A Smoking cocaine.

Q Who was smoking cocaine?

A Everybody that was in the house.

Q Well, I mean were you smoking it?

A Yes, sir.

Q Was Coleman Gray smoking it?

A Yes, sir.

Q All right. Now, when was this that you-all went over to the house?

A Inside-- It was inside that week and-a-half.

Q All right. Go ahead.

A And after we finished free basing we came back home. And I left my free base bowl over there, so he carried me back another day to get it. When I went and got it we free based a little more and came back, and that's-- As we was passing Murphy's Mart he looked over at Murphy's Mart and said, "Linda was right, the store close and everybody's out of the store at quarter to 9:00, or quarter after 9:00."

So, we pulled over and we parked. We was observing people coming up to the store. And we sat out there for a while, and then--

Q Where were you-all parked?

A In the parking lot.
Q What store were you in front of?
A I think it was Greenhood Distributors.
Q All right. Whose car were you in?
A Coleman's Gray.
Q Is that Coleman Gray's red Cutlass with the white top you're referring to?
A Yes, sir.
Q Who was driving the car?
A Coleman Gray.
Q All right. Now, as you were sitting there in the car what was your purpose for sitting there?
A I didn't really have a purpose as of then.
Q Okay. So how were you-all facing?
A We was facing Greenhood Distributor.
Q All right. I realize you were in front of Greenhood Distributors, but where was the nose of the car facing?
A Murphy's.
Q All right. And at that time, approximately what time was it that you-all were facing looking at Murphy's Mart?
A We sat there until about from 9:00 something to about 11:00 something, something after 11:00.
Q All right. Was anybody in the Murphy's

Mart store at the time that you-all were sitting there?
A Yes, sir.
Q Who was sitting in there?
A Security guard.
Q Who was in the Murphy's Mart store?
A Security guard and Mr. McClelland.
Q And how did you know that they had gone into the store?
A Well, I didn't know that they had gone into the store. We saw them walking back and forth around in the store.
Q Oh, I see. Is that when you-all turned in, when you saw them walking back and forward in the store?
A No, sir. We just pulled up and parked but we noticed a car in the parking lot.
Q Okay. All right. Now whose idea was it to pull into the parking lot in reference to the Murphy's Mart that night?
A Well, Coleman Gray pulled in. It wasn't an idea. We were just coming back and he looked over there and say, "Linda was right, everybody's out of Murphy's at quarter to 9:00, or quarter after 9:00." And he turned off and parked in the parking lot.
Q All right. How, how long did you-all sit in front of Greenhood Distributors waiting, looking at the Murphy's Mart itself?
A Maybe three hours, two hours and a

half, something like that.

Q And eventually what happened?

A Security guard and Mr. McClelland came out, left, and went to Hardee's.

Q All right. Now did they leave in the same car or separate cars?

A Separate cars.

Q And when they left what did you-all do?

A We followed them.

Q All right. And what happened when they got to Hardee's?

A The security guard went through the drive-thru. Mr. McClelland went on the inside, and we waited until he came out.

Q Where did ya'll wait while Mr. McClelland was inside the store?

A In Hardee's parking lot.

Q And where in Hardee's parking lot were you-all in reference to Mr. McClelland's car?

A eside his car, parked beside his car.

Q How close to his car? I mean, one space, directly beside it, or was it any space between you or not?

A One space away.

Q All right. Now, what kind of car was Mr. McClelland driving?

A It was a small gray car.

Q All right. Now tell us if you would what happened? Did Mr. McClelland eventually leave the Hardee's?

A Yes, sir.

Q Or come out of the store?

A Yes, sir.

Q And what happened as he was coming out of the door of Hardee's?

A He got into his car and left.

Q All right. Did you and Coleman Gray have any discussion regarding that?

A Yes, sir. When he came out, before he came out to his car we was discussing whether to get in his car or wait for him, before he got in. But, we didn't. So he got in his car and left.

Q All right. Now, after he got in his car and left what direction did he head?

A Back up towards Smithfield, going towards down 17.

Q Route 17?

A Yes, sir.

Q Was that headed towards the city limits of Suffolk?

A Yes, sir.

Q And what happened as he headed down Route 17? Where were you-all?

A We was behind him.

Q All right. And after you-all were behind him what path or route did you-all follow?

A I don't know the name of the street, but I think we went up through Driver's, through the back way of Driver's.

Q All right. And where did you eventually end up?

A I don't know the name of the place.

Q All right. Was it in an intersection area?

A Yes, sir.

Q All right. And at that particular intersection was that the intersection of Bennett's Pasture Road and Nansemond Parkway?

A Yes, sir; I think it is.

Q Now, what happened as you pulled up to that intersection? Who was in front, you-all or Mr. McClelland?

A Mr. McClelland.

Q Did he pull up to the stop sign? Did he stop?

A Yes, sir.

Q And who was driving the car you were in at that time?

A Coleman Gray.

Q And what did Coleman Gray do when Mr. McClelland stopped at that stop sign?

A Pulled across in front of him,

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blocked--

Q How did he pull in front of him?

A When he came, when he slowed down to stop he just pulled across in front of him like, blocked the car.

Q How did he go around Mr. McClelland? Did he go around the passenger's side or the driver's side?

A Around by the passenger's side.

Q All right. And then how did he park his car? Could you take your hands and show the members of the jury how he pulled around?

A This was Mr. McClelland's car here. This was Coleman Gray's. (The witness indicated with his hands.) He blocked it off in front like this here.

Q All right. Could you stand up just a second to show the members of the jury? All right, if this sheet of paper right here is Mr. McClelland's car which is stopped at the intersection-- We have a photograph of Mr. Gray's car. Would you take that car. You were behind him, right?

A Yes, sir.

Q Behind the piece of paper. Take the car behind it and I want you to show the members of the jury how he blocked him off?

A Just came in around through here like this and came across here like this here.

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(The witness indicated with a piece of paper and a photograph.)

Q So, he pulled at an angle in front of Mr. McClelland's car?

A Yes, sir.

Q All right. Now, after he pulled in front of McClelland's car like that what did Gray then do?

A Gray got out the front of the car here, and walked around to the driver's side. And I got out the side of the car and came around to the back.

Q All right. Speak up now so the members of the jury can hear you.

A Gray got out his car, walked around to Mr. McClelland's, to the driver's side. And I got out the other side and walked around to the car.

Q You walked around to whose car?

A Mr. McClelland's car.

Q Did you get into Mr. McClelland's car?

A No, sir.

Q What did Mr. Gray do?

A Just walked—Ordered him out the car.

Q Did either one of you-all have a weapon?

A Yes, sir.

Q Who had a weapon?

A Coleman.

Q What kind of weapon did he have?

A .32 revolver.

Q All right. Was it loaded?

A Yes, sir.

Q Whose gun was it?

A Coleman's Gray gun.

Q Do you know where he got it from?

A I couldn't-- I know where he say he got it from.

Q Where did he say he got it from?

A That was Matt house, dude named Matt.

Q Matt?

A Yes, sir.

Q Matthew Drewery?

A Yes, sir.

Q All right. Now, after Mr. Gray pulled the gun on Mr. McClelland how did he hold it on him and what did he do?

MR. MOORE: Your Honor, I object to the leading testimony. There hasn't been any testimony he pulled a gun. There is testimony he had the gun.

MR. FERGUSON: I'll rephrase the question, Your Honor.

MR. FERGUSON, Continuing-

Q You have indicated Mr. Gray had the gun. What did he do with the gun as he approached Mr. McClelland's side? What did he do?

A He had the gun pointed at Mr. McClelland.

Q And what did he order Mr. McClelland to do?

A Get out the car, get into the car that we was in.

Q And did Mr. McClelland obey his orders?

A Yes, sir.

Q What did Mr. McClelland do?

A He was sitting in the car. When he first pulled up on him he was sitting in the car and he asked him to get out the car, to come get in our car. And Mr. McClelland was, I guess he was scared. He was slowly getting out and he hit him a couple of times.

Q He did what?

A Hit him a couple of times.

Q Who hit him?

A Coleman Gray.

Q Hit who?

A Mr. McClelland.

Q With what?

A With his hand.

Q With his hand? Did he hit him hard or not?

A He hit him. He hit him hard enough to let him now he meant business.

Q I see. All right. Now, where were you standing when all this was going on?

A Right beside him.

Q On the driver's side or on the passenger's side?

A On the driver's side.

Q So ya'll were right there together?

A Yes, sir.

Q All right. Now, after Gray hit him a couple of times, told him to get out, did Mr. McClelland get out?

A Yes, sir.

Q And where did he then go?

A To Coleman's Gray's car.

Q And where did he get in Mr. Gray's car?

A Around on my side, through the passenger's side. Sat in the back seat.

Q And what did you then do?

A I got in the front of the car. I got around in the passenger's side and Gray came around and got in his side.

Q What happened to Mr. McClelland's car?

A Well, Gray had pulled Mr. McClelland's car over there to the side of the road.

Q All right. And after he pulled the car over to the side of the road what did he do?

A He came back, got in his car. Came back through the intersection and came back.

Q Now, speak up Mr. Tucker so all these members of the jury can hear you. Now, after you got back in the car where were you, in the driver's seat or the passenger's seat?

A Passenger's seat.

Q Where was Coleman Gray?

A In the driver's side.

Q Where was the gun?

A The gun was up front.

Q All right. Well, where up front?

A Sitting in a little pocket up in the front of his car.

Q Well, but I mean where was it in relation-- Who had it, you or Gray?

A No one had it at that time.

Q Was it between you-all?

A Yes, sir.

Q All right. Now, at that point what happened? What did you-all-- Did you make any statements to Mr. McClelland?

A Yes, sir.

Q Tell us about what statements were

made.

A The statement that was made about what would happen if he didn't do what was told.

Q Who made those statements?

A Me and Gray.

Q So you made some threatening statements to Mr. McClelland?

A Yes, sir.

Q What threatening statements did Mr. Gray make?

A About his family. Same as I did.

Q Well, tell me what those statements are? We don't know what they are.

A We threatened him that if he didn't do as we told him we, we would do this, that, and the other to his family.

Q I want to know when you say, specifically, when you say this, that, and the other , I want to know specifically what you told him you-all would do to them if he didn't do what you told him to do, in the words that you used.

A Well, we just told him that we would do-- I don't think we said what we would do. We just mentioned his family.

Q You mentioned that you would do harm to them?

A Yes, sir. I mean, we indicated that but we didn't say what kind of harm.

Q I see. All right. Now, how did you know he had a family?

A Because saw the photos in his wallet.

Q How did you get his wallet?

A We asked for the keys.

Q Was that as soon as you got in the car?

A No, not as soon as we got in the car.

Q Well, where were you? Who asked for his wallet?

A Well, we didn't ask for his wallet. We asked for the keys. That's when he said the keys were in the wallet and he put his wallet up front.

Q When he put his wallet up front what happened?

A We went through the wallet. I went through the wallet.

Q You did it?

A Yes, sir.

Q Was anything, any money in the wallet?

A Yes, sir.

Q How much money?

A About $600 or $700.00.

Q What did you do with that money?

A Took the money out, placed it in my sock, and--

Q Did you place it in your sock

immediately at that time?

A No, sir.

Q Where did you put it as soon as you took it out of the wallet?

A The wallet was placed up there on the console, in the pocket on the console as we were going back, headed towards Bellville.

Q Is there a console in Mr. Gray's car?

A Yes, sir.

Q Now, what did you do after that? What did you do? Where was the wallet itself put?

A Up on the console.

Q All right. Now, after you got the money out-- Was there anything else in his wallet that made you know he had a family?

A Yes, sir; some photos of his, I guess it was his children.

Q All right. Is that when you-all made the threatening statement regarding his family if he didn't do what you said?

A Yes, sir.

Q All right. All right now, speak up, Mr. Tucker, so everybody can hear you. If anybody can't hear, please let me know and I'll get him to speak up.

Now Mr. Tucker, after you-all got the man's wallet where did you-all head towards?

A Toward Murphy's Mart.

Q And what was the purpose in heading towards Murphy's Mart?

A To get him to call security, go into the store.

Q All right. Now, tell me a little bit about that. What conversations did you-all have as you were heading back towards Murphy's Mart, if any, relating to the security?

A We asked him the security of the store and how would he go about turning off the alarm in the store.

Q All right. And what did he indicate to you?

A He said, he told us there was a number that he had to call to get the alarms turned off.

Q All right. Did you-all tell him what you would do to him if he didn't do it?

A I suppose we did.

Q I want to know what you told him as you were going along.

A Well, I don't think we told him anything. We was making threats about his family.

Q Who was?

A Coleman Gray and I.

Q Both of you-all, as you were going along were continuing to make threats towards his family?

A Yes, sir.

Q All right. Now Mr. Tucker, eventually did you arrive at the Murphy's Mart store?

A Yes, sir.

Q All right. And when you arrived there where did you-all park your car? Where was your car put, Gray's car?

A Over on the side, on the side road of the Murphy's Mart.

Q All right. And when you got at that point what then happened when you arrived? Why did you park the car there or why did Mr. Gray park the car there?

A So the car wouldn't be seen.

Q All right. And what was then done?

A Gray got out the car. Mr. McClelland got out the car. First we asked who was going in.

Q Who asked that?

A Well, I can't remember who. Well, I can't remember who asked the question, but we wanted to know who was going in with the man.

Q You mean a conversation between you and Gray?

A Yes, sir.

Q All right. So what happened as you-all discussed who was going in?

A Nothing happened. We just came to the conclusion. He just went in.

Q Who went in?

A Coleman Gray.
Q Would go in?
A No. He just went in.
Q All right. And who went in with him.
A Mr. McClelland.
Q Now, when Gray went in where was the gun?
A Coleman Gray carried the gun with him.
Q Why did you stay in the car? What was the purpose of that?
A Purpose of me staying in the car was to, for fear. I mean, so to make him think that if things didn't go right I was going back to his house.
Q In other words, that even if Gray got caught you would go get his family?
A Yes, sir.
Q Did you make that clear to Mr. McClelland?
A Well, I told him.
Q You told him that?
A Yes, sir.
Q All right. Now, as a result of that did Mr. McClelland cooperate with you-all?
A Yes, sir.
Q Did he ever resist you in any way whatsoever?

A No, sir.
Q Now, how long approximately-- Did Gray and Mr. McClelland eventually end up inside the store?
A Yes, sir.
Q And actually do you know how long they were in there? Approximately?
A About a half an hour; something like that.
Q All right. And eventually did they come back out to the car?
A Yes, sir.
Q And when they came out what did they have with them?
A Push cart.
Q What do you mean, a push cart?
A A shopping basket.
Q You mean one of those metal baskets like you use in a Murphy's Mart store?
A Yes, sir.
MR. MOORE: Your Honor, I object to the leading question. Mr. Ferguson doesn't have to testify.
THE COURT: Well, I don't think it makes any difference. I think everybody understands what kind of basket he had, but go ahead.
MR. FERGUSON: All right, sir.

MR. FERGUSON, Continuing-

Q So in any event, he came out with a push cart basket; is that correct?

A Yes, sir.

Q Is that one of the standard baskets like they use in the Murphy's Mart stores?

A Yes, sir.

Q All right. Now, what was in this basket?

A Three bags of money.

Q And what was done? Where were the money bags put?

A The money bags were took out of the basket and put in the back seat.

Q Who took the money bags out and put them in the back seat?

A Me, Coleman Gray, and Mr. McClelland.

Q All right. And after the money bags were put in the car-- Were they heavy? Or let me rephrase it. How many did you lift?

A I think it was about one; maybe two.

Q Were they heavy or light?

A It was sort of heavy.

Q All right. And all the bags were put in the back of the car?

A Yes, sir.

Q What happened after the bags were

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put in the car?

A Mr. McClelland was told to get back into the car.

Q Did he get back in?

A Yes, sir.

Q And where was the weapon at that time?

A Coleman Gray still had the weapon.

Q All right. Now, after making McClelland get back in the car what did you do?

A Got back in the passenger's seat.

Q Where did Coleman Gray get?

A He got in the driver's side of the car.

Q All right. And after you did that did you-all leave the Murphy's Mart area?

A Yes, sir.

Q And where did you head?

A To-- We was coming out to the intersection of Hardee's. Coleman Gray pulled over to the gas station to get some gas.

Q And where did he get-- What did he put the gas in?

A He put some in the car and put some in the gas can.

Q Where was the gas can that he had?

A It was in the trunk.

Q Trunk of the car?

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A Yes, sir.
Q All right. Now, while you were over at the gas station did Mr. McClelland make any moves or try anything funny?
A No, sir.
Q All right. Had you-all made any statements to him about what would happen if he did?
A No, sir; not-- All the threats had stopped before we got to the Murphy's Mart.
Q I see. Did he cooperate with you in every way?
A Yes, sir.
Q Now, after you got the gas and put the gas in the gas can where did you go?
A To the campus of Frederick College.
Q Tidewater Community College?
A Yes, sir.
Q All right. And was that off of Route 17?
A Yes, sir.
Q And what happened as you turned off Route 17 on to College Drive? Where did you then go?
A We went straight down the road.
Q All right. And what happened then?
A We made a right up on College Drive.
Q Okay.
A And went to--

Q Where did this right take you to?
A To the area that Mr. McClelland was shot.
Q All right. And how did you pull into this area?
A We made a right.
Q Okay.
A Went in, we passed by the college. We went down, made a right and it was a road on the side. We pulled about a car length and-a-half down the road and backed in.
Q Was this the little road there where Mr. McClelland was shot?
A Yes, sir.
Q And after you turned into that little road, you then backed in?
A Uh-huh.
Q All right. And what happened after you backed into there?
A Mr. McClelland was asked to get out of the car.
Q Who asked him to get out of the car?
A Coleman Gray.
Q And what did you do when Gray asked him to get out of the car?
A I got out the car, let him out the side of the car.

Q What side did McClelland get out on?

A The passenger's side.

Q All right. And where did Mr. McClelland then go?

A Around to the back of the car.

Q And how far behind the car was he?

A About 15 or 20 feet; something like that.

Q All right. And when he got back there behind the car, as the car was sitting and McClelland went to the back of it, was the front end of the car facing towards College Drive?

A Yes, sir.

Q So you could pull straight out at that point?

A Yes, sir. We could pull-- I had to pull out but we still have to make a left to get back on the road.

Q I understand that, but I'm talking about off of the side road?

A Yes, sir.

Q All right. Now, when Mr. McClelland went back to the back what happened behind the car?

A -- He said, first thing he said was, said don't shoot him or don't hurt him or something like that.

Q Who said that?

A Mr. McClelland.

Q Who did he make that statement to, not to hurt him or shoot him?

A Coleman Gray.

Q And who had-- Did Gray have any kind of weapon at that point?

A Yes, sir. He had the pistol.

Q This .32 caliber?

A Yes, sir.

Q All right. Now, after Mr. McClelland asked him not to hurt him what did Gray do, or order Mr. McClelalnd to do?

A He told him he won't going to hurt him, said he was just going to tie him up.

Q So what did he have McClelland do?

A Had him get on the ground.

Q All right. And did Mr. McClelland get all the way on the ground?

A Yes, sir.

Q All right. And what happened after Mr. McClelland got on the ground?

A That's when I got into the car.

Q And what happened as soon as you got in the car? What did you hear?

A Some gunshots.

Q How did the gunshots go?

A Just one after another.

Q Do you know about how many were fired?

A I can't say how many were fired, but the gun was empty.

Q The gun was empty?

A Yes, sir.

Q Now, how did the gunshots go? Were they one after the other or was there some hesitation between them?

A No, sir; won't no hesitation.

Q All right. How many shots did you. hear?

A It was about, I guess it was about five shots, maybe six.

Q All right.

A It was just one shot after the other.

Q All right. Now, after you heard those shots what happened then?

A I came around and got into the car.

Q Who did?

A Coleman Gray.

Q And when he got into the car what did you say to him or what conversation did you have?

A I asked him why did he do that, and he said he had to because the man knew him. And I asked him did he see him, and he said, "Yea, he was looking in my face the whole time I was in the store."

Q All right. Now, after he told you that what then happened?

A We pulled off and started out down

the road and went towards 17, back down 17.

Q What happened to the gun?

A I don't think he was holding the gun. I guess he put it back up front.

Q All right. What happened to the shells in the gun?

A Well, he took the shells out of the gun and reloaded the gun.

Q All right. Who did he give the empty shells to?

A To me.

Q All right. And how many shells did he give you?

A I guess it was about six.

Q Allright. What did you do with these shells?

A Throwed them out the side of the window.

Q Where were you when you threw them out the side of the window?

A On the passenger's side.

Q I know that, but I mean where?

A In Coleman's Gray's car.

Q I understand that, but at what location?

A College Drive.

Q Somewhere on College Drive?

A Yes, sir.

Q Now, after Coleman reloaded the gun what did he then do with it?

A I can't remember. He put it up. I can't say where he put it at.

Q All right. Now, after he put that up where did you-all go in the car?

A Through Huntersville headed up towards Bellville.

Q Is Huntersville an area kind of behind or off to the side of College Drive? Is it kind of a short-cut?

A Yes, sir.

Q All right. And as you cut through Huntersville did you eventually come out to Route 17?

A Yes, sir.

Q Now, after you hit 17 where did you-all go then?

A Made a right on 17.

Q Where did you go to?

A To Mr. McClelland's car.

Q And when you got to the car, McClelland's car, did you-- or before you went to McClelland's car did you talk with Gray about what ya'll were going to do?

A Yes, sir.

Q What conversation did ya'll have?

A Well, I was wondering why he didn't pull straight over and go to Bellville.

PAMELA H. ASKEW
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Q Is that where you and Coleman Gray lived, in Bellville?

A Yes, sir.

Q All right. Go ahead.

A And he said he was going to burn up Mr. McClelland's car because he had to burn up the evidence.

Q All right. And so after he said you were going to burn up Mr. McClelland's car to burn up the evidence did ya'll go to McClelland's car?

A Yes, sir.

Q And when you got to McClelland's car what happened?

A He took the gas can out, dashed some gas in there and I threw the wallet in the car.

Q All right. Who got the gas can out?

A Coleman Gray.

Q Where did he get it out of?

A Out of his trunk.

Q Was this the same gas can that he had filled up when ya'll had stopped to get gas?

A Yes, sir.

Q Now, where did he throw gas in the car?

A In the front, in the back.

Q All over the car?

A Yes, sir.

PAMELA H. ASKEW
COURT REPORTER

A I don't know, really.

Q You don't know?

A No, sir.

Q But wherever he was shot, ya'll left his body there?

A Yes, sir.

Q All right.

MR. FERGUSON: I have no further questions. Answer defense counsel.

MR. MOORE: Your Honor, we would like to take a short recess. We would request one.

THE COURT: All right, sir. Ladies and gentlemen, take a short recess.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND RETURNED TO THE COURTROOM FOLLOWING A BRIEF RECESS.

MR. FERGUSON: Your Honor, I have a few additional questions I would like to ask Mr. Tucker.

MR. FERGUSON, Continuing-

Q Mr. Tucker, the time this incident occurred were you employed?

A Yes, sir.

Q Where were you employed?

A Hampton Roads Sanitation Department.

Q Speak up, now.

A Hampton Roads Sanitation Department.

Q All right. Is that the Nansemond Treatment Plant?

A Yes, sir.

Q And Mr. Tucker, had you ever taken Mr. Gray to that particular location, or had he ever been over there before, to the plant site itself?

A Yes, sir.

Q Had you ever given him a tour of the plant?

A Yes, sir.

Q All right. Now in that regard, you have indicated that this was the weapon that was used in this particular incident. What happened to the gun after Mr. McClelland was killed?

A Some days later we throwed it in the contact tank.

Q Who throwed it in there?

A Coleman Gray.

Q All right. Were you with him when it was thrown in the contact tank?

A Yes, sir.

(A photograph was shown to Mr. Eason by Mr. Ferguson.)

Q Mr. Tucker, I have got a photograph I would like to show you and ask you if this photograph

depicts the Nansemond Treatment Plant where you are talking about?

A Yes, sir.

Q And what is the contact tank? Can you-- Is the contact tank depicted in that photograph?

A Yes, sir.

Q All right. And would you mark-- Have we got a pen? Would you mark an "x" at the location on which the gun was thrown?

A This contact tank here.

(The witness so marked on the photograph.)

Q Okay. I don't know whether they can see that. Okay. I think they can see the mark. Put a big "x" over that location, if you would. All right. I think they can see it.

Now, what is this contact tank? What does this do in the treatment plant? Where is this in relation to the other things in the plant itself?

A Well, that's the last spot, that's the last spot the water go before it leaves off the plant.

Q All right. Why was the gun thrown in the contact tank as opposed to any other location?

A Because it suppose to leave the contact tank and go out to the river.

Q All right. That was what you-all hoped it would; is that right?

A Yes, sir.

Q All right. Whose idea was it to

throw the gun in the contact tank?

A I guess it was his idea. He throwed it in there.

Q All right. But you were right there with him when he threw it?

A Yes, sir.

Q Were you working on the day he came over there with the gun or not?

A Yes, sir.

MR. FERGUSON: Your Honor, I would ask that this photograph be marked and introduced into evidence as a Commonwealth's exhibit in these proceedings.

MR. MURDEN, CLERK: "33".

MR. FERGUSON, Continuing-

Q Now Mr. Tucker, prior to the robbery going down had you and Mr. Gray gone to the Murphy's Mart store?

A Yes, sir.

Q Who did you go over there with?

A His wife.

Q And how long was that before the robbery went down?

A That was still inside the week, week-and-a-half.

Q Within the week?

A Yes, sir.

SYLVESTER JOYNER, having been first duly sworn, was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Would you state your name for the jury and for the Court?

A Sylvester Joyner.

Q And Mr. Joyner, where are you presently living?

A In the Suffolk City Jail.

Q And are you awaiting sentencing on a heroin-related charge, possession of heroin conviction?

A Yes.

Q Now Mr. Joyner, were you awaiting trial back in May, on May 10, 1985, in the Suffolk City Jail on that heroin-related charge?

A Yes, sir; I was.

Q And so we can get the record straight, Mr. Joyner, you have been previously convicted of several felonies; have you not?

A Yes.

Q Is it not true that you have been convicted of one burglary, two grand larcenies, along with your current conviction of possession of heroin?

A Yes.

Q In addition to that have you not

been convicted of either four or five petit larcenies, or crimes involving moral turpitude, unlawful concealment?

A Yes.

Q In addition to that you have been convicted of one petit larceny as a juvenile; is that correct?

A Yes, sir.

Q How old are you, Mr. Joyner?

A Thirty-two.

Q Now, I want to take your attention back to that particular time, around May 10th of 1985. Did you have occasion at that time to be in the same cell block with the defendant in this case, Coleman Gray?

A Yes.

Q All right. I believe he was brought in jail on a drug-related charge; is that correct?

A Yes.

Q Was that the purpose for which he was in jail at that time?

A Yes, he was.

Q Now, while you were in jail did you have occasion to have any conversations with Mr. Gray in reference to the murder of Richard McClelland, the manager of the Murphy's Mart store?

A Yes.

Q Tell the members of the jury, if

you would, how these conversations got started?

A Well, it was publicized on T.V. a lot.

Q Okay.

Q And Mr. Gray, you know, he was acting real funny about it. He talked to me about it.

Q Speak up, okay?

A And you know, he was asking me, you know, certain things about, you know, that case. And, you know, telling me about it and things of this nature here.

Q All right.

A And as we kept on talking, you know, he told me, said, you know, he was involved with it.

Q Who did he say was involved in this case?

A Him and Melvin Tucker.

Q All right. What else did he tell you about it?

A Well, you know, I asked him, you know, certain things, you know, about the robbery and he was telling me about it.

Q What was he telling you about the robbery?

A Well, told me how they had done it.

Q How did he tell you they had done it?

A Well, he told me, said they had

waited for the man to come out the store that night, and when he came out that's when they got him, carried him back to the store. The man was at a fast food place.

Q All right.

A And they carried him back to the store. That's when they made him go in the cash box or whatever.

Q Now, what other conversations did you have with him? After they had done the robbery, what did he tell you they did then?

A I asked him, Why did, you know, Why did they have to kill him, you know, because they had, you know, got what they wanted, you know. And he said he had to kill him because the man knew him.

Q Did he tell you who specifically had killed Mr. McClelland?

A He said he did.

Q Did he tell you how he did it?

A Yea.

Q How did he tell you he did it?

A Said they had carried him behind the school, you know, tied him up and he shot him in the head.

Q Who said he shot him in the head?

A That what Gray said.

Q Are you referring to the defendant in this case, Coleman Wayne Gray, when you say Gray?

June, you said between the 1st and 5th.

A Well, I don't know the exact date he came in jail. You know, I can't be exact about saying it's the 1st or 2nd or 3rd. I can't be exact to say which particular day he came in jail.

Q Well, we can't be exact as to when you had the conversation with him, either, and that's what I'm asking you.

A Well, I'm trying to give you the best answer that I can.

Q Well, can you give me some approximation? You're saying that it was sometime around the 1st to the 5th of June?

A Yea. It would be somewhere in that neighborhood.

Q And then you contacted Sergeant Lilley?

A Yes.

Q And you say that Coleman Wayne Gray, during one of these two conversations that you had with him, told you that he had tied up the hands of Richard McClelland?

A Yes.

Q Did he tie his feet, also?

A Well, I don't know if he tied up his feet or not. But he said he tied his hands behind his back and had stuck something in his mouth to keep from him hollering.

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Q Did you ever hear about Mr. McClelland getting his hands tied up while you were listening to the T.V. or reading the newspaper articles regarding that?

A I really can't say for sure, you know, because, you know, I really didn't pay that no mind.

Q Did you hear any of the newspaper, hear any of the T.V. stories or read the newspaper articles after you had your conversation with Coleman Wayne Gray?

A What you mean? After it had happened?

Q Yes, sir.

A Oh, yea. It was in the paper and in the news.

Q You had conversations with Mr. Gray?

A Oh, no, no. Not after he had got arrested. After he got arrested he didn't never come back to the Suffolk City Jail.

Q And you also said that Mr. Gray told you that he fired five or six shots?

A Yes.

Q He was not specific?

A No. No, he wasn't specific about it.

Q Mr. Joyner, when are you set to go to court on your sentencing for your possession of heroin?

PAMELA H. ASKEW
COURT REPORTER
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it, --

Q All right. Go ahead.

A -- the robbery. And that his wife had worked for the place there, Murphy's Mart, and the man that she had worked for had fired her, okay?

And he had mentioned the fact that it was him, his wife, and a guy named Tucker involved.

Q All right.

A And he had also said where he had placed the body.

Q Where did he say that was?

A Only thing I could recollect was in a field.

Q All right.

A And he also stated that he killed this man.

Q He indicated that he himself had shot and killed the man?

MR. EASON: Your Honor, I object to the leading question.

MR. FERGUSON: I'll rephrase the question.

MR. FERGUSON, Continuing-

Q Did he indicate to you how he killed the man?

A No.

Q But that was his words; is that

correct?

A (The witness nodded affirmatively).

Q Where were you when this conversation was going on?

A I was three cells down from him.

Q When you say "he", the man that made these statements that you indicate, do you see him in the courtroom today?

A Yes, I do.

Q Would you point the man out that said he killed the man?

A He's sitting right over there.

Q For the record, you're referring to the defendant in this case, Coleman Wayne Gray?

A Yes, I am.

Q Now, Mr. Ferrell, after you received or heard this information did you have occasion to send a letter to the commonwealth's attorney in Chesapeake regarding at least that you had information in this regard?

A Yes, I did.

Q Mr. Ferrell, I show you this letter and ask if this is the letter you sent to Mr. Kowalsky, the commonwealth attorney, in Chesapeake?

A Yes, it is.

Q Is that your writing as well as your signature?

A Yes, sir.

Q And is that where you sent it to him?

A Yes, sir.

MR. FERGUSON: Your Honor, I would ask that the letter that he wrote to Mr. Kowalsky be marked and introduced into evidence as a Commonwealth's exhibit.

MR. EASON: Your Honor, if I may examine the letter.

MR. FERGUSON: Excuse me. I thought I gave you a copy.

MR. EASON: I'd like to see the original, and I haven't read it yet, either.

MR. FERGUSON: I'm sorry.

(The letter was read by Mr. Eason).

MR. MURDEN, CLERK: "43".

MR. FERGUSON: I have no further questions for Mr. Ferrell.

CROSS EXAMINATION

BY MR. MOORE:

Q Mr. Ferrell, you're obviously not incarcerated at the present time: is that correct?

A No, sir.

Q When did you get out of jail?

A October 15th.

Q When was the agreement made that

you would come testify today?

A When was the agreement made?

Q Yes.

A It was no agreement made. I was subpoenaed.

Q When did you talk with the commonwealth's attorney?

A I believe it was Monday.

Q Monday of this week?

A Yes, sir.

Q What were you in jail for?

A Burglary and arson. I believe it was burglary and arson.

Q Burglary and arson?

A Arson.

Q Were you convicted of those?

A Yes, I was.

Q How much time did you get?

A Twelve months.

Q You serve all of it?

A Yes, I did. Well, eight of the twelve.

Q Have you, other than the burglary and the arson that you were spending in the Chesapeake jail on, have you been convicted of any other felonies or misdemeanors involving moral turpitude, such as lying, cheating, or stealing?

A No; just misdemeanor bad checks.

Q How many?
A Three.
Q Three different charges or three different convictions?
A They were all in Chesapeake.
Q Three convictions?
A Yea.
Q And you say you were three cells down from this person who was making all these confessions; is that correct?
A That's right.
Q How many people were in each cell?
A One.
Q One person?
A In each cell.
Q And you were in one cell. Were you on the same side as Mr. Gray?
A Yes, I was.
Q Nobody was in the cell with you?
A No.
Q And who was in the next cell adjacent to you?
A A man named Donald.
Q Who?
A A man named Donald.
Q And the next cell down was who?
A Carl.
Q Carl? Next cell down was who?

A Coleman.
Q Coleman Gray? And you heard all this from four cells down; is that right?
A Yes.
Q Had you ever met this man before?
A No.
Q Never cellmates with him?
A Sir?
A Were you ever cellmates with him?
A No.
Q Did he ever introduce himself to you?
A No.
Q When did this conversation take place that you overheard?
A When did it take place?
Q Right.
A It was conversation the whole time he was there.
Q When was he there?
A Approximately end of July, first of August.
Q The end of July and the first of August?
A Yes.
Q And according to a copy of the letter here that's been introduced into evidence, the letter from you to Mr. Robert E. Kowalsky, that letter is dated

September 2nd; is it not?

A That's right.

Q Some thirty days or a month after Mr. Gray left the jail?

A That's right.

Q And you got out of the jail when in Chesapeake?

A October the 15th.

Q October 15th. So, he had been gone for some thirty days or a full month before you spoke up to the commonwealth's attorney; right?

A That's right.

Q Then right after you wrote the letter to the commonwealth's attorney you're on the street, right?

A Not right away, no.

Q Took a few weeks?

A Yea.

MR. MOORE: No further questions.

MR. MOORE, Continuing-

Q What is Carl's last name? You indicated a man that was incarcerated by the name of Carl. What was his last name?

A Seemed like to me it was Bond or Bonds, or something like that.

Q Bonds?

MR. MOORE: No further questions,

A I said I'm not sure of the exact date that I talked with him. I don't keep records of things like that. But I do know it was in July when I talked with Mr. Gray.

Q And you contacted Sergeant Moore of the Newport News Sheriff's Department that same day?

A I talked with Sergeant Moore on July the 5th. That's what the record indicates.

Q Your record indicates that?

A That's what the jail record indicates.

Q Did you contact Sergeant Moore the same day you spoke with Coleman Wayne Gray?

A Couple of days afterwards. But, I had talked with Mr. Gray several times before that. We had recreation together at least I say five or six times, maybe more, and there was two and-a-half to three hour sessions.

Q So you and Mr. Gray had met in the Newport News City Jail on at least five or six occasions?

A Yes.

Q Every one of those occasions was in the recreation department or the recreation room at the jail?

A In the recreation room, right. In the recreation room at the jail they have a section so that you can view wide screen T.V. Then they have a section so that you can sit down, if you want to

run some research or look at any law books, or what not; they have a section for that.

Q .. And these meetings would have taken place sometime during June and early July?

A April-- Wait a minute. June, July; yes. You're right. You're right.

Q June and July?

A Yes.

Q During that period of time you were in isolation over at the jail itself; were you not?

A Not because of any rule infractions, no. I was there by choice.

Q You were in isolation by choice?

A Yes. Well, it's not really isolation. It's not really isolation that I was in.

Q You were in isolation and in a single cell on various occasions for disruptions you were causing in the jail; were you not?

A That is not true at all.

Q Aren't you referred to over at the jail as the jailhouse lawyer?

A Some inmates look at it in that respect; yes.

Q When did you first know of these charges which were placed against Coleman Wayne Gray?

A When I talked with him at the city jail.

Q That very first meeting of those

five or six that you had?

A Yes. He was referred to me by an individual by the name of Gangrene, a guy that he knows here from Suffolk that's in the Newport News City Jail. Like I say, he wanted some information on these drug charges that he had pending against him and it was nobody in the jail that knew how to properly go about looking up the information, so he consulted me.

Q Okay. And you also indicated a few moments ago in questions from Mr. Ferguson-- Excuse me, maybe you did not indicate. I appologize. Let me rephrase that.

Have you ever told anyone that Mr. Gray told you that he had tied up the hands of Richard McClelland?

A Yes, I did.

Q Mr. Gray told you that?

A Yes, he did.

Q He told you that at the first meeting or at the last meeting?

A I don't know the exact meeting it was, so much that took place during our conversation. I didn't want him to think during the time I was trying to get any kind of information out of him or anything.

Q Okay.

A As a matter of fact, I probably wouldn't have-- I don't think I would have said anything at all, like I said, until the man just started laughing about what he did, you know, the fact that he killed

the man. This is what he confessed to me.

Q Mr. Smallwood, you're married; are you not?

A Yes, I am.

Q How many children do you have?

A Set of twin sons.

Q How old are they?

A Five years old.

Q And you would like to be with them and the family; wouldn't you?

A Sure would.

Q You know you're facing penitentiary charges.

A Yes, sir. I'm facing time in the penitentiary. Already got it.

Q And isn't it a fact you also even wrote Judge Smith, the sentencing judge in your case over in Newport News and asked for his consideration to help you out?

A Help me out in what way?

Q Any way he could.

A Sure, I did it.

Q And you'd do anything to get out of the penitentiary as quick as possible, get back to your family?

A No, I wouldn't do anything to get out. Not anything, no.

Q But you would do some things?

THE COURT: Well, if it's anyone that you think you might want to recall--

MR. FERGUSON: I would rather have them excluded.

MR. EASON: Is Michael Andrews in the court yet? He is on call and evidently on his way over, Your Honor.

THE COURT: All right, sir.

(The witnesses were excluded.)

DEPUTY WALTER MAXWELL, having been first duly sworn, was called as a witness on behalf of the Defendant and testified as follows:

DIRECT EXAMINATION

BY MR. EASON:

Q Would you state your name, please?

A Deputy Walter Maxwell.

Q And Deputy Maxwell, where are you employed?

A Newport News Sheriff's Department.

Q And what is your position with the Sheriff's Department, Deputy Maxwell?

A Presently? A recreation officer there.

Q Okay. At the present time is there an inmate in your jail by the name of Jeremiah Smallwood?

A Yes, it is, sir.

Q All right. Do you have with you today those records that you keep regarding inmates and the recreation room use?

A Yes, I do.

Q It is your duty as a deputy sheriff for Newport News to be in charge and to keep those records?

A Yes, sir.

Q Could you tell the jury and the Judge from your examination of those records what times if any that Jeremiah Smallwood and Coleman Wayne Gray would have had access at the same time to the recreation room in the Newport News City Jail?

A Okay. Upon looking at my records there were five separate times that the two inmates in question had the opportunity to be in the rec room at the same time, but only on two occasions were they actually in the rec room at the same time.

Q The two occasions were which dates?

A The 26th of June '85, and the 3rd of July.

Q 1985?

A '85; right.

Q Those other three occasions, why did those-- You said there were five total occasions. On those other three occasions they did not meet in the rec room; is that correct?

A Correct.

Q Okay. Is that because Mr. Gray was not available to go to the rec room, or did not desire to go to the rec room?

A On two of those occasions Mr. Gray had refused. On another occasion he was in Suffolk court.

Q Okay. Mr. Smallwood, who is still in your city jail, is presently what-- Excuse me. At the time back, of May and June and early July, what was his status within the jail as far as his bedding and rooming is concerned?

A He was in isolation. I do not know the exact date, but during that time span he had set a fire in his cell and he was placed in isolation. Fifteen minute checks were brought up on him. He was watched very closely at that time.

Q Was he causing other disturbances in the jail during his course or period in there?

A Nothing violent, per se, but we did keep him isolated per order of the medical staff for a psychological or medical reasons. I'm not exactly certain what.

MR. EASON: Thank you, Deputy Maxwell. Answer Mr. Ferguson.

CROSS EXAMINATION

BY MR. FERGUSON:

Q Deputy Maxwell, your records do indi-

cate that Jeremiah Smallwood and Coleman Gray were, in fact, together, had access to each other, had an opportunity to talk to each other on both June 26th as well as July the 3rd; isn't that correct?

A Yes, sir.

Q Are you aware of your own knowledge of the fact of Mr. Smallwood contacting one of your deputies or officers in an attempt to try to get in touch with the Suffolk Police Department relative to information he had on July the 5th?

A I'm not aware of it, sir.

Q You're not aware of that?

A No, sir.

Q All right. And, of course, what you have testified to here is based on the records that you have at that particular time.

A Yes, sir.

Q But under any circumstances, at least on June 26th and July 3rd they had access to each other, were able to carry on conversations and other things?

A Definitely, sir.

Q Is it not also true that sometimes they may have had contact with each other without some formal logging being made? Sometimes can't things be done on a casual or an informal basis?

A It was possible. At one time they were both housed on the same floor, so in transporting

they could have possibly contacted each other.

Q Well, that's what I'm saying. There are other instances where they may have had contacts that were not specifically noted in logs and things of that sort?

A Yes, sir.

Q But your logs do indicate on at least two occasions that you have indicated even the records indicate they were together and had an opportunity to converse and carry on conversations and that kind of thing?

A Yes, sir.

MR. FERGUSON: That's all I have. Thank you very much.

MR. EASON: We have no other questions for Deputy Maxwell.

THE COURT: Do you need him any further?

MR. EASON: No, sir. He can be excused as far as we're concerned.

MR. FERGUSON: I have no need for him.

MR. EASON: Sergeant Lilley.

SERGEANT CARL E. LILLEY, having been first duly sworn, was called as a witness on behalf of the Defendant and testified as

follows:

DIRECT EXAMINATION

BY MR. EASON:

Q You are Sergeant Carl Lilley, who has earlier testified; is that correct?

A Yes, sir.

Q Sergeant Lilley, you've already testified that you had occasion to meet with one Sylvester "Jake" Joyner here in the Suffolk City Jail; is that also correct?

A Yes, sir.

Q And just one question, Officer Lilley. During that meeting with Mr. Joyner is it not true that Mr. Joyner asked you if you had any pull with Mr. Ferguson, the Commonwealth's Attorney, to influence him or ask him to drop the drug charges against him which were pending at the time of the conversation?

A Yes, sir.

MR. EASON: That's all I have.

CROSS EXAMINATION

BY MR. FERGUSON:

Q Sergeant Lilley, at that particular time that you first talked with Mr. Joyner, did he contact you?

A He contacted me.

Q All right. And did he provide you

A He was talking to myself and another inmate, Mr. Bobby Angel.

Q Did you overhear all the conversations?

A Yes, I was right next to them. Couldn't help but hear it.

Q And what did Mr. Gray ever say about his role in the crime?

A He said he was-- he always maintained his innocence. He said that, what the evidence that the policeman had were, you know, it wasn't, you know-- He told me about the evidence the police allegedly had. He stated they found a fingerprint on a receipt of a credit card, said something about the police had said they had found a gun in some water, and he also said that him and his wife were completely innocent.

Q So, he was talking about the crime to ya'll down there?

A Yes, sir.

Q Anybody down there could have heard him talking about the crime?

A Yes. Yes.

Q Did he ever say anything other than that he was innocent?

A No. He maintained his innocence the whole time I was there. He never said he was guilty in any way.

MR. MOORE: No further questions.

Q But isn't it true as it regards inmates?

A I wouldn't know. I'm not in the general population.

MR. FERGUSON: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MOORE:

Q When did you first hear about this case; that you may be called as a witness to testify?

A Pardon?

Q When did you first hear that you might be called as a witness to testify in this case?

A A member of the Suffolk law enforcement agency, they contacted me at first.

Q When was that?

A About two or three weeks ago.

Q And wanted to see what you had to testify about?

A Yes, sir.

Q You told them at that time the same thing you told me today; is that right?

A Yes, sir.

MR. FERGUSON: Let me just ask a couple of questions.

RECROSS EXAMINATION

BY MR. FERGUSON:

Q Mr. Bond, at that time didn't you tell the Suffolk law enforcement agency that the events were not very clear in your mind because it happened so long ago, and that immediately after the incident had happened you contacted Detective Slezak? Isn't that what you told him? Isn't that true?

A No. I had contacted-- I had offered to contact-- I was listening out for Mr. Gray to give evidence concerning his involvement in the slaying--

Q Not in this Murphy's Mart you weren't?

A Yes, I was.

Q By who?

A I was waiting on any-- in either case, it made no difference. It made no difference at all.

Q I see. Who asked you to try to gather evidence as it related to the Murphy's Mart case.

A No one asked. No one asked me at first. I had volunteered to Vessie of the Chesapeake Sheriff's Department any information that I did receive.

MR. MOORE: Your Honor, I have a motion for the Court right now. If we could have the jury excluded, please.

MR. FERGUSON: All right.

THE COURT: All right. Would you

take the jury out, please?

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, I move for a mistrial. Mr. Ferguson has brought forth evidence and put into the record of a statement that this man made to police officers which is exculpatory. The Court has ordered the Commonwealth Attorney to make the defense aware of all evidence that the Commonwealth may have that was exculpatory. It should have been made available to us. Now, they had this man three weeks ago, and he told them at that time that he was in that jail cell and that Gray was down there and he made nothing but a confession of innocence.

At the same time the Commonwealth brings another witness in here who tells ycu the contrary. That's a statement that the Commonwealth had. Now it's trying to impeach this man with exculpatory evidence. We were entitled to it. The Commonwealth has violated the Court's order and I respectfully move for a mistrial.

The evidence has been brought in before the jury right now pertaining to this particular matter. It's going to taint their opinion of this, and there is no other remedy available to the Court other than to declare a mistrial at this time.

In the alternative we would ask the Commonwealth to be forced to stop this line of questioning because it's getting to an area that's apparently going for mistrial in this case in any event.

THE COURT: Well gentlemen, I'm going to cut out this business. We're getting into an area involving maybe some other crime, and I don't want to get into that. If we get into that you are going to have a mistrial.

Now, as far as the statment is concerned I don't know what statement he gave the police officers, but, in any event he is here, he is available, and he has testified.

I'm going to overrule your motion for a mistrial.

MR. FERGUSON: Your Honor, I would just refrain it simply to attacking his statement as it relates to this particular thing, whether he made these statements.

THE COURT: Well, I gathered you were getting into some other area.

MR. FERGUSON: I will avoid that, Your Honor.

MR. MOORE: Your Honor, right now I would also--

THE COURT: Let me see the statement that he made.

MR. FERGUSON: Your Honor, the only questions I wanted to ask him were in reference to

TRIAL CONTINUING IN THE FOREGOING MATTER ON DECEMBER 6, 1985, AND THE FOLLOWING MATTERS WERE TAKEN UP IN THE JUDGE'S CHAMBERS PRIOR TO THE COMMENCEMENT OF THE TRIAL.

PRESENT: Mr. C. Phillips Ferguson, Attorney for the Commonwealth

Mr. Carl E. Eason, Jr., Counsel for the Defendant

Mr. James A. Moore, Counsel for the Defendant

Mr. Henry C. Murden, Circuit Court Clerk

MR. MOORE: Your Honor, we have a motion with respect to the scope of the evidence admitted to be presented by the Commonwealth during the penalty trial today in this case.

The Commonwealth is relying on Watkins v. Commonwealth, which is a recent Supreme Court case, 229 Va., decided in June of this year. He's relying upon that case to bring in potential evidence that the defendant, Wayne Gray in this case, committed another murder. And the Commonwealth has admitted, has given us the suggestion that he intends to put evidence on of the photographs of the victims of that murder as well as other evidence of that murder.

Now, this Court has ruled in our favor when

we argued Peterson at the beginning of these proceedings, and the Peterson case was a Virginia Supreme Court case that set forth that it was preferred practice for the Commonwealth's Attorney to reveal to the defendant upon the completion of the capital murder trial, assuming that the defendant was convicted of capital murder, and prior to the penalty trial, it was preferred practice that the Commonwealth's Attorney make known to the defendant what evidence he intends to adduce at the penalty trial. And you have ruled in our favor on that and Mr. Ferguson accordingly yesterday in the afternoon of December 5th gave us information as to the evidence that he intends to adduce today. And that evidence, for the first time made known to us, was that he intends basically to put on evidence to try or go a long ways in trying another murder.

This is the first time that Mr. Eason and I heard that he would do anything other than put on inmates' statements, supposed inmates' statements, that our Mr. Gray had made to fellow inmates that he killed the Sorrells.

We were made aware of that on Monday morning by Mr. Ferguson. He said that he had people that would come forth and say that he not only did the Sorrells but committed other murders, and we were prepared for that, argumentatively and evidentiary-wise.

However, we are not prepared to rebut, put on any rebuttal evidence because of the shortness of notice. We are not prepared to try the Sorrell murder today. We have not been given sufficient notice.

The case relied upon by the Commonwealth, Watkins v. Commonwealth, was an entirely different situation from the one we have today.

THE COURT: Well, tell me what evidence you're complaining about here.

MR. MOORE: I'm complaining about anything other than statements he may have made to a fellow inmate. If he's going to take one statement that he made or two statements he may have made to a fellow inmate and then based on that statement bring in pictures of the victims, I think that goes beyond the scope. He can't try it.

THE COURT: Well, the cases hold that you can do that, though, Jim.

MR. MOORE: Well, I don't think so, Judge, because in this case-- In the Watkins case the defendant had been charged with two murders. The lawyers who were representing him in the first murder trial were already representing him with respect to the second murders. They were aware of all the charges, were aware of the evidence that was available to the Commonwealth in the second

murder charge and were in a position to confront the evidence possibly that would come in the penalty trial.

We have a different situation here. This situation today, of being able to try the Sorrell murder in effect in this trial, is different from the Watkins situation because in the Watkins situation he had been charged.

THE COURT: Well, what you are complaining about is the photographs; is that right?

MR. MOORE: I'm complaining about him bringing in fingerprints or the photographs or anything of that nature.

MR. FERGUSON: We are not bringing in fingerprints. We are bringing in the officer that went to the scene of the crime and what he found to just show that a crime did occur and what was there, and secondly, to bring in Dr. Presswalla to show the cause of death and the nature and extent of the injuries. And that's it.

MR. MOORE: Well,I think that he can't go beyond the statements. But what he's doing, he puts a statement in that he did it and brings all that in. In essence, what he's doing is trying that case in the minds of the jurors. And my narrow argument, Your Honor, is that it is beyond the scope of Watkins because in Watkins when they did that, obviously they did it in Watkins,

the man had already been charged. His lawyers were aware of the charges. The defendant was aware of the charges. The lawyers were able to take precautions and rebuttal and be prepared for those things.

We are not prepared for any of this, other than he may have made some incriminating statements. It's beyond the scope of Watkins.

MR. FERGUSON: Your Honor, the problem is Watkins doesn't say that. Watkins goes on and says you can adduce evidence in the case. As to whether a man's charged or not is totally irrelevant. It goes way beyond that scope and, in fact, in Watkins they brought in the medical examiner, photographs, and they didn't even have a confession of the defendant in that case. In fact, they had to rely on a co-defendant's testimony as to the facts of the case itself. And it's very clear from the-- I didn't bring my law with me but I have got the case and I can point that out to the Court.

THE COURT: I think the Court has held that you can go into unadjudicated matters.

MR. FERGUSON: Whether charged or not.

THE COURT: Which would be the-- I mean, if you can get in the fact that he made a statement.

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MR. MOORE: I agree with you, Judge. I agree that the statement can come in. That statement can come in, the fact that he said it. Not for the truth of the matter. But if they go one step further, if they go one step further and say, Well, he said this statement, let's go take a good look at all the gory bodies of the victims and everything, I think that's just highly inflammatory.

THE COURT: Well, this is at that stage of the trial, though, Jim.

MR. FERGUSON: That's what I have got to prove to get the death penalty. I have got to prove that.

THE COURT: You have got to prove the vileness, the depravity, or the future dangerousness of this man in order to make a case for the death penalty. Just as you have got to play it down, he's got to play it up.

I think it's admissible at this stage of the trial. Certainly it would not be admissible at any other stage.

MR. MOORE: All right. Note my exception for the record, Judge. That's all I have, Judge.

THE COURT: All right. Okay.

MR. FERGUSON: Your Honor, I need to get one thing.

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TRIAL CONTINUING IN THE COURTROOM.

PRESENT: Mr. C. Phillips Ferguson,
Attorney for the Commonwealth

Miss Nancy G. Parr,
Assistant Attorney for
the Commonwealth

Mr. Carl E. Eason, Jr.,
Counsel for the Defendant

Mr. James A. Moore,
Counsel for the Defendant

Mr. Coleman Wayne Gray,
The Defendant.

THE MEMBERS OF THE JURY PANEL WERE PRESENT AND SEATED IN THE JURY BOX.

THE COURT: All right, gentlemen, are you ready?

MR. FERGUSON: The Commonwealth's prepared, Your Honor. Has Lawrence Tucker come in yet?

MR. MOORE: The defense is ready, Your Honor.

MR. FERGUSON: We have one witness, Your Honor, he hasn't come in but I think we can go ahead and proceed.

THE COURT: All right. Call your witnesses.

MR. FERGUSON: Would all the Commonwealth witnesses stand? We have several that

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MR. FERGUSON: No, sir. Call Detective Slezak.

MR. MOORE: Your Honor, I have a motion I would like to make out of the presence of the jury, please.

THE COURT: All right. Ladies and gentlemen, step in the jury room, please.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, at this time I would like to renew my motion to have excluded from evidence during this penalty trial any evidence pertaining to any other-- any felony for which the defendant has not yet been charged. The basis for this would be that it beyond the scope of what's been testified to. What's been testified to is we have a statement from someone who said the statement was made to him. We don't have any evidence that this man has been charged with the Sorrell murders. We don't have any evidence that he's been indicted by the Sorrell murders. All we have here is a statement made to an inmate. And if the Commonwealth's Attorney wants to introduce hardcore evidence as a result of those murders to the jury it will do nothing

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more than inflame the jury and will infer precisely and concisely that this man did the killing, which, in essence, will mean that he will have been tried of the Sorrell murders right in our very presence today.

And as I have argued to the Court earlier in this trial today, we have had no notice of this, short of the last twenty-four hours we have had notice of it. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. He's not been indicted.

We understand that the authority relied upon by the Commonwealth is Watkins vs. Commonwealth, a recent decision, but our position is that this scope that the Commonwealth intends to enter at this time, that the scope of the evidence to be adduced by the Commonwealth at this time is beyond the Watkins case because the Watkins case in which one murder, of a defendant convicted of murder as is to Gray right here, is when the Commonwealth during the penalty trial put on testimony of another murder. It was of another murder, that of which the defendant had already been charged. It was another murder that the defense counsel were actively participating in representing the defendant.

And we ask, Judge, not to allow this evidence. Defense was taken by surprise. And the jump from Mr. Gray's statement to the co-defendant-- and that's

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all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. It's too great a jump, too broad a jump and only serves to inflame the passion of the jury so that justice in this particular case cannot be rendered. And we ask that the evidence be excluded for that basis.

MR. FERGUSON: Your Honor, on this issue there are a couple of things I'd like to state. First of all, I would state for the record that I advised Mr. Moore prior to yesterday afternoon. They were well aware that the Commonwealth intended to introduce evidence. In fact, I told him before this trial began that the Commonwealth-- that if this defendant was found guilty at the sentencing phase we intended to introduce evidence which would show this defendant has confessed to other crimes involving murder, specifically the Sorrell murder.

In addition, Mr. Moore was fully aware of that fact.

The Commonwealth, at this point, has introduced evidence which if believed by this jury would be sufficient, coupled with obviously establishing the corpus delicti, that he could be convicted.

The Watkins case is very clear on cases or crimes where a person has not been convicted.

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The Watkins case says,"itis essential that the jury have before it," and it underlines it,"all possible relevant information about the individual defendant whose fate it must determine." "We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted."

It's very clear that the Commonwealth is entitled to introduce this evidence because this evidence goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing, and that is that this defendant has a proclivity for violence and that he does represent a high degree of future dangerousness to the community. And the Commonwealth must establish that fact through the evidence and must prove it beyond a reasonable doubt that he would represent a probability of future dangerousness.

What better way to prove future dangerousness than to show that this man has committed other murders? And that's precisely what the Commonwealth is doing.

I think based on the Watkins case, the Quintana case, as well as the Peterson case the Commonwealth is clearly without any question whatsoever entitled to introduce this evidence.

I would therefore respectfully ask that the Court overrule defense counsel's motion.

MR. MOORE: Your Honor, I would like to take a matter up with the Court. I hate to

take up any more time, however, the Commonwealth has mis-stated something that's put the shadow on the defense counsel, and I want to clear it up.

He has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.

But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.

My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that.

So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.

THE COURT. Well, gentlemen, you were aware of it yesterday.

MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

THE COURT: At the conclusion of

the guilt stage we discussed the penalty stage, and at that time Mr. Ferguson made you aware of what his evidence was going to be. I'm going to overrule your motion and note your exception in the record. let's take a short recess.

MR. MOORE: Thank you.

TRIAL CONTINUING IN THE COURTROOM AFTER A BRIEF RECESS AND THE MEMBERS OF THE JURY PANEL WERE PRESENT IN THE COURTROOM AND SEATED IN THE JURY BOX.

THE COURT: All right, sir.

MR. FERGUSON: Call Detective Slezak.

DETECTIVE M. I. SLEZAK, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A M. I. Slezak, police officer, City of Chesapeake.

Q And Detective Slezak, would you

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MR. FERGUSON: I have no further questions. I would ask that Detective Slezak remain. I don't think I'll need him, but rather than release him this second I would ask him to remain just momentarily.

THE COURT: All right. That's all.

MR. FERGUSON: Dr. Presswalla.

(Discussion off the record.)

DR. FARUK B. PRESSWALLA, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A Faruk, F-a-r-u-k, Presswalla, P-r-e-s-s-w-a-l-l-a.

Q And what is your position or occupation, Dr. Presswalla?

A I'm the Deputy Chief Medical Examiner for the Tidewater Region.

Q And in that capacity what do you do? What is your function in that capacity?

A I investigate sudden, unexpected,

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unusual, unnatural, and violent deaths, deaths in legal custody, and deaths in which cremation or disposing at sea is the method of disposition of the body.

And in the course of the investigation I do autopsies when necessary with a view to determining the cause and manner of death, and obtaining any medical, legal information which may help explain the circumstances surrounding the death.

Q Can everybody on the jury hear? All right. If you can't if you would raise your hand, I'll get him to sepak up. Thank you.

Now Dr. Presswalla, how long have you been a medical examiner with the State of Virginia?

A For the past approximately nine years.

Q All right.

MR. FERGUSON: Mr. Eason, is there any question about his qualifications as an expert?

Mr. Eason: We would certainly stipulate as to his qualifications, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON, Continuing-

Q Dr. Presswalla, in that regard did you have occasion to examine and conduct an autopsy on the bodies of Lisa Sorrell and Shanta Sorrell?

A I did.

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Q All right. And Dr. Presswalla, would you tell us when did you make this examination of those two people?

A This was on the 11th of December, 1984.

Q And what did your-- Let's take them one at a time. What did your examination of Shanta Sorrell reveal?

A Shanta Sorrell was a baby, three years old, and my examination revealed that she had died as a result of carbon monoxide inhalation. Carbon monoxide is a noxious gas which is produced any time there is incomplete combustion. So, whenever there is any kind of combustion part of the combustion is complete, which produces carbon dioxide, and the part that's incomplete produces carbon monoxide.

This is present in any fire, whether it be smouldering or hot. It's also present in automobile exhausts. She died as a result of inhaling this which then combined with the hemoglobin in the blood and therefore prevented the blood from carrying oxygen, and kills the person.

Q Dr. Presswalla, did you examine specifically, the windpipe of her body?

A Yes.

Q What did you find in the windpipe?

A I found evidence of soot inhalation, that is, carbon from smoke. This is something that

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would take place with a fire, especially if there is smouldering. You do not see soot if it's from the automobile exhaust.

Q All right. And Dr. Presswalla, did you have occasion to file your report in this particular case regarding Shanta Sorrell?

A I did.

Q Dr. Presswalla, I show you first of all this photograph and ask if you can identify that photograph for the members of the jury?

A Yes, I can.

Q And who is that a photograph of?

A This is Shanta Sorrell, on whom I performed this autopsy, about whom I was referring just now.

Q Dr. Presswalla, does this medical examiner's report, is this your report that you filed in this particular case, excluding the hearsay information about how you came into contact with the bodies and those kinds of things?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I would like the record to reveal that we have struck from the summary certain hearsay information about how the body was discovered, where it was discovered, that Dr. Presswalla, I assume, has no personal knowledge of; is

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that correct?

THE WITNESS: Well, that was reported to me in the normal course of business by my local medical examiner who went to the scene. I did not go to the scene.

MR. FERGUSON: Right. That's fine. Your Honor, we would offer the photograph into evidence as Commonwealth's Exhibit Number—

MR. MURDEN, CLERK: "53".

MR. FERGUSON: And the autopsy report as Number "54".

MR. EASON: Your Honor, we have no objection to the report as it has been changed by the Court, of course, subject to our continuing objection on the whole matter.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, did you also conduct an examination and autopsy on Lisa Sorrell?

A Yes, sir; I did.

Q Would you tell us the results of that examination?

A Lisa Sorrell was a young lady, and she showed evidence of gunshot injuries. She had six gunshot wounds to the back of her head, all located in an area to the back and to the right of the midline, right about here. (Indicating.) Of these six gunshot injuries, two of the bullets had

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passed through the head and exited and I could not find those bullets. The other four had stayed in the head and I recovered those bullets and they appeared to be .32 caliber bullets. Apart from the gunshot injuries she had only a minor scrape on her wrist.

Q Dr. Presswalla, I show you this photograph and ask you if you can identify that for the members of the jury?

A Yes, I can.

Q What is that?

A This is a photograph depicting the back of the head where I shaved the head to depict the gunshot wounds of Lisa Sorrell.

Q All right. And I show you this second photograph and ask you if you can identify that?

A Yes. That's a closer view of the same area.

Q All right. Shows it more clearly, the six wounds?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, I would ask that these two photographs be marked and introduced into evidence as Commonwealth's exhibits in these cases.

MR. FERGUSON, Continuing-

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Q Finally, I show you this medical examiner's report and ask if that is the report that you filed in these proceedings and sets forth the nature and extent of the wounds?

THE COURT: I'm only going to admit one of them.

MR. FERGUSON: I will simply offer, the first one will be sufficient. I think it shows the face, as well as the wounds. That's sufficient.

THE COURT: All right.

MR. MURDEN, CLERK: "55".

MR. FERGUSON, Continuing-

Q Does this reflect your report, Dr. Presswalla?

A Yes, sir; this does.

Q And as in the other case, I believe, in the report that is being filed any evidence which may constitute hearsay, that is that you didn't have, was deleted from the report or from the summary; is that correct?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, we would offer these two exhibits into evidence as Commonwealth's exhibits. I would withdraw the earlier.

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THE COURT: That's the one you want?

MR. MURDEN, CLERK: That's been marked.

THE COURT: That's the one you handed me that you wanted.

MR. FERGUSON: I appologize. I misunderstood the Court. It makes no difference.

MR. MOORE: If it doesn't make any difference, we want the smaller one.

MR. FERGUSON: It makes no difference. That's fine. I'll simply withdraw this one.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, specifically were you able to determine the cause of death first of all of Shanta Sorrell?

A Yes, sir; I was.

Q What was the actual cause of death?

A She died as a result of carbon monoxide intoxication.

Q And were you also able to determine the cause of death of Lisa Sorrell?

A Yes, sir; I was.

Q And what was the cause of death of Lisa Sorrell?

A She died as a result of multiple gunshot wounds, namely the six gunshot wounds to her head which injured her brain.

Q Dr. Presswalla, in reference to

Lisa Sorrell, could you tell us whether any one of those six wounds to the back of the head could have been fatal?

A Yes, sir.

Q Any one of the six would have been fatal alone?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Dr. Presswalla. I would like to show the exhibits to the members of the jury.

THE COURT: All right, Mr. Moore?

(The previous exhibits were published to the jury.)

MR. EASON: We have no questions, Your Honor.

THE COURT: All right. Do you need Dr. Presswalla any further?

MR. FERGUSON: We have no further need for Dr. Presswalla. As far as I'm concerned he's free to be excused.

THE COURT: All right, Doctor, thank you. You may go.

THE WITNESS: Thank you, sir.

MR. FERGUSON: Your Honor, the Commonwealth rests.

MR. MOORE: Your Honor, the defense

MR. EASON: That's all of our evidence, Your Honor.

THE COURT: Is that the case?

MR. FERGUSON: We have no evidence.

THE COURT: All right. Have you got the instructions, Mr. Murden?

MR. MURDEN, CLERK: Yes, sir.

THE COURT: Ladies and gentlemen, at this time I'm going to read the instructions that apply to the penalty stage of this case, and you will take them with you when you go to your jury room.

We have also prepared the form of verdict for your use. It's in an alternative form. There are four different findings that you can make, and I will explain these to you.

Now, the first instruction is: You have convicted the defendant, Coleman Wayne Gray, of capital murder, which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment.

Before the penalty can be fixed at death the Commonwealth must prove beyond a reasonable doubt at lease one of the following two alternatives:

1. That after consideration of his history and background there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

Depravity of mind is a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.

Aggravated battery is a battery which is qualitively and quantitatively more culpable than the minimum necessary to accomplish an act of murder.

The Court instructs the jury that in determining what punishment may be imposed you may consider any evidence of mitigation either offered by the defendant or shown by other evidence.

Now, in the alternative jury verdicts that you have, ladies and gentlemen, the first of these encompasses both of the alternatives and that reads:

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Or, you may find one of the next two alternatives:

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

the house, saw the money, approximately a thousand dollars worth of money in his apartment, and asked him how it occurred. And Melvin went into some detail, what Coleman Gray said: He and his wife were both involved in this particular crime. The wife was the driver of the get-away car and Coleman Gray was the man that actually went in the place at gunpoint, held up the two employees and put them in the freezer.

And Tucker asked him a question, Well, was the freezer cold? Coleman Gray was going to leave them there. And I ask you what would have happened to those people had Melvin Tucker not called the police and notified them of what had occurred? These people would have been locked in a freezer for a long period of time and perhaps these people would have died as well.

You have also heard testimony in this particular case from Melvin Tucker relative to a statement that the defendant made to him relative to the Sorrell murders. And the defendant, Coleman Gray, told Tucker as they were going up the steps one day—it was some girl that had been saying things or the rumors were going through the neighborhood about his involvement in the Murphy's Mart case-- and Coleman Gray, in very graphic language indicated that he could take her off just like he had taken some other girl off.

And then when he went upstairs when he was talking about that other girl, he showed Melvin Tucker

who he was talking about in the newspaper and pointed to a picture of Lisa Sorrell.

Now, you have heard testimony from Detective Slezak in this case, who went to the scene and discovered the automobile where the body of Lisa Sorrell, the mother, and a young child were found in the trunk, and the testimony and the evidence has shown that that car was set on fire just like the one in the Richard McClelland case. And not only that, but that the method of death, the method of execution for Lisa Sorrell was by .32 caliber weapon, same caliber weapon as we have in this case, six shots to the back of the head-- identical to the Richard McClelland case. She was stuffed in the car, matches found on the seat, tried to burn the car up; obviously the fire went out.

But it didn't go out in time enough for Shanta Sorrell, for Shanta Sorrell was put in the trunk of that car. That child had no way to get out, and she lay there and died of carbon monoxide poison with soot backed up all in her throat, and Dr. Presswalla indicated that was from the fire, not from any gasoline or car running. When you find soot in the throat that's from the car being burnt up.

Now, members of the jury, if that pattern of criminal conduct does not indicate a person who would have a probability of continuing to commit criminal

acts of violence or criminal acts in the future, then there is no such record that can, for the crimes that you have heard about that this defendant has committed and been convicted of, or alternatively admitted doing, are simply atrocious. They're murder, robberies, brutal systematic execution-style crimes; and those crimes are the same kinds of crimes that you had before you when you heard the facts on the Murphy's Mart case.

So, when you couple the vileness of the Murphy's Mart case itself and look at this man's prior criminal history it leads to one and only one conclusion, and that is that Coleman Wayne Gray, after considering his history and background, not only there's a probability, but that frankly there is an absolute certainty that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

So, based on that evidence there can be no question that the Commonwealth in this case has not only proven beyond a reasonable doubt, but has proven beyond all doubt that this defendant has a propensity to future dangerous criminal conduct. On that prong alone you, as members of the jury, have the right to impose a penalty of death.

In this particular case you do not have to rely solely on that prong of the test, for you can, in addition to that, go to the second test, and

to commit future crimes of violence. There can be no question about that. He's committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter; and he shot Ron Whitte, and it's fortunate that the last bullet didn't strike him or one of the members of his family.

This man has no conscious at all, and rather ironically, I think the real key that really exemplifies what this case is all about was the statement that was made by Jeremiah Smallwood, a man who came here today and testified, he's got absolutely nothing to gain. He's got to go to the penitentiary. And he told you that, I wouldn't even have said anything except for one fact, when the man talked about killing Mr. McClelland he laughed and thought it was funny.

Well, members of the jury, if that was funny then he must have been looking at different pictures than I would say that you-all looked at as it regarded Richard McClelland, because there was nothing funny about those pictures. In fact, they were brutal, they were atrocious, they were vile, they were horrible, and as inhumane as one person can be to another.

I suggest to you members of the jury that we are not asking for revenge in this case. We have proven to you both prongs of the test beyond all

doubt, and when you consider those facts the decision really makes itself. For if this is not an appropriate case for the death penalty, then I suggest to you there is no such case, both as to his prior record and acts of criminal violence and also as to the atrociousness of this crime itself.

I ask you for one thing in this case-- two things. Number one, I ask you to impose the penalty of death. That's not an easy thing to ask, and I'm sure it's not an easy thing for any of you to do. But, it's the only penalty that will bring justice in this case. And that's what we are here for, is to see that justice is done.

Should the innocent victim in this case, Richard McClelland, be required to serve a punishment greater than that which is administered to his murderer, Coleman Gray? Certainly not.

I think what it boils down to is there are simply certain crimes in which a defendant demonstrates that he is no longer capable of living in the human society, and Coleman Wayne Gray has demonstrated that in this case. He's demonstrated it in the Whitte case. He's demonstrated it in the killing of the man in California, and he's demonstrated it in the brutal manner in which Lisa and Shanta Sorrell were murdered.

This man has forfeited his right to live with other human beings, not because of anything

anybody's done to him, but by his own acts.

Members of the jury, I ask you to remember all these facts. I ask you to go to your jury room and return a verdict of death, and I ask you to do so on the basis of both prongs of the test, that is the first form on the jury verdict form of the four possible verdicts; for I again suggest to you that we have proven in this case beyond all doubt that he falls into both categories.

There is really very little I can say at this point. I have said all that really can do. The only thing I can leave you with is this: Coleman Wayne Gray has been tried. He has had twelve jurors to sit and listen to this case. He has had a separate penalty hearing. He's been represented by very capable attorneys. He has been afforded all due process there is.

Unfortunately, the same cannot be said for Richard McClelland, for he was charged, tried, convicted, and systematically executed without anything or having done anything whatsoever. The only justice in this case is that the murderer receive at least the same fate as that of Richard McClelland, for he should not receive a lesser punishment. Thank you.

THE COURT: Let's take a short recess, ladies and gentlemen.

your sitting in judgment of another human being. Let me ask you a question: Did Coleman Gray sit in judgment of Richard McClelland; did he sit in judgment of Ron Whitte; did Coleman Gray sit in judgment of the man in California that he killed; and did he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?

Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

You have already determined guilt in this case. That is not an issue. Your only concern is what is a just punishment.

As I indicated to you earlier, and as you took your oath, you took an oath that if a proper case is presented, each of you indicated to the Court when Judge Godwin asked the question, If a proper case is presented to you can you personally impose the penalty of death? And each and every one of you indicated yes.

Well, members of the jury, in this particular case the Commonwealth has presented to you a proper case for the death penalty. We have shown not only the facts of the McClelland case itself, but also the other brutal, vicious, and vile acts that this defendant has committed.

It seems to me that he has already been

Well, members of the jury, that's exactly what we have in this case. And based upon that testimony I ask you to find this defendant-- You have already found him guilty, and I ask you to impose a sentence of death; for I think the question that each of you must answer in this case is not whether you can live with yourselves if this defendant is sentenced to death. The question is, can you live with yourselves after hearing all the testimony, all the evidence, all the different crimes of murder and otherwise that this defendant has committed, can you live with yourselves if you don't? And that is the question.

Based on that I ask you to impose a sentence of death. If there was ever a case where it's justified the Commonwealth has presented it to you today and throughout this week.

Thank you very much.

THE COURT: All right, ladies and gentlemen, you can retire to your jury room to arrive at your verdict, taking with you the Court's instructions and exhibits admitted into evidence.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM TO BEGIN THEIR DELIBERATIONS AT 4:40 P.M.

THE COURT: Court stands in recess.

(The following was dictated to the court reporter out of the presence of the jury and the Court during the recess.)

BY MR. EASON:

Exceptions to the three instructions tendered to the Court but refused by the Court to be considered in the penalty phase: I respectfully request that our exception be noted to the refusal by the Court.

TRIAL CONTINUING IN THE COURTROOM.

THE COURT: Now, regardless of what jury verdict is brought in at this time, this case is not over. Now, I don't want any exclamation, I don't want any outbursts from anybody in the court-

room, whatever the verdict may be. Everyone will remain seated, except the officers, until the jury is completely out of the building.

I don't want anybody to have any contact with the jury. If it's reported that any member of the jury is harrassed by anybody the Court is going to deal with it very severely.

All right, bring the jury in, please.

THE MEMBERS OF THE JURY PANEL RETURNED TO THE COURTROOM AT 5:50 P.M. FOLLOWING THEIR DELIBERATIONS.

MR. MURDEN, CLERK: Ladies and gentlemen, have you arrived at a verdict in this case?

FOREMAN CULBERTSON: Yes, we have.

MR. MURDEN, CLERK: May I have it, please?

THE VERDICTS FORMS WERE PRESENTED TO THE COURT.

THE COURT: All right. Will you read the verdict, please?

MR. MURDEN, CLERK: "We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after

a consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

Signed, Lawrence E. Culbertson, Foreman.

Members of the jury, is this your verdict, and so say you all?

EACH MEMBER OF THE JURY PANEL ANSWERED AFFIRMATIVELY.

THE COURT: Would you like the jury polled, gentlemen?

MR. MOORE: Yes, Your Honor.

MR. MURDEN, CLERK: As I call your names if this is your verdict you will answer yes. If it is not, you will answer no.

Ruth Vann?

JUROR VANN: Yes.

MR. MURDEN, CLERK: Joyce McClenny?

JUROR MCCLENNY: Yes.

MR. MURDEN, CLERK: Dorothy Carr?

JUROR CARR: Yes.

MR. MURDEN, CLERK: Lorraine Gayle?

JUROR GAYLE: Yes.

MR. MURDEN, CLERK: Willie Nelms?

JUROR NELMS: Yes.

MR. MURDEN, CLERK: Clara Simpson?

JUROR SIMPSON: Yes.

MR. MURDEN, CLERK: Lawrence Culbertson?

FOREMAN CULBERTSON: Yes.

MR. MURDEN, CLERK: Cathy Ralston?

JUROR RALSTON: Yes.

MR. MURDEN, CLERK: Harvey Quimby?

JUROR QUIMBY: Yes.

MR. MURDEN, CLERK: John Riley?

JUROR RILEY: Yes.

MR. MURDEN, CLERK: Francis Fitzgerald?

JUROR FITZGERALD: Yes.

MR. MURDEN, CLERK: Robert Turner?

JUROR TURNER: Yes.

MR. MURDEN, CLERK: Have all the members of the jury been polled?

THE COURT: All right, ladies and gentlemen. It's been a long and difficult week. We appreciate your services, the time that you have given, and the effort that you have put forth in

No. 95- ____

IN THE
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October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

PROOF OF SERVICE

I, Paul G. Turner, counsel for Petitioner Coleman Wayne Gray, do swear that on this date, October 23, 1995, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

John H. McLees, Jr.
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for
Respondent - J.D. Netherland, Warden

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 1995.

Paul G. Turner,
Counsel for Coleman Wayne Gray

EDITOR'S NOTE

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No. 95-6510 (4)

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On Petition for a Writ of Certiorari
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RESPONDENT'S BRIEF IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

I. Should this Court grant certiorari to review a claim which the Fourth Circuit held was barred by the "new rule" doctrine and which, in any event, is barred by the petitioner's procedural default in state court?

II. Is petitioner's so-called Brady claim properly before this Court when he never appealed to the Fourth Circuit the district court's ruling that the claim was both procedurally barred and without merit?

III. Does petitioner's claim regarding the alleged "vagueness" of Virginia's "vileness" aggravating circumstance fail to raise a cognizable federal issue?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted and sentenced to death on February 3, 1986, after a jury trial in the Circuit Court of the City of Suffolk, Virginia, for the capital murder in the course of robbery while armed with a deadly weapon of Richard M. McClelland.

The jury's death verdict, upon which the trial court entered judgment, was based upon findings of both predicates of Virginia's death penalty statute, i.e., "vileness" and "future dangerousness." On direct appeal, the Supreme Court of Virginia affirmed the death sentence on both grounds. Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987).

Pertaining to Gray's trial in state court, the following facts were found by the Supreme Court of Virginia in its direct review of Gray's conviction and death sentence:

> Both Gray and Melvin Tucker were indicted for capital murder. Afterwards, the Commonwealth's Attorney elected to try only Gray on the charge of capital murder and entered into a plea bargain with Tucker whereby he would be tried on a charge of first-degree murder.

233 Va. at 331, 356 S.E.2d at 166-67.

> [R]ichard McClelland was the manager of Murphy's Mart Store in the City of Portsmouth. He and the store's security guard worked late the evening of May 2, 1985, both having arrived at the store between 9:30 and 10:00 a.m.
>
> On the same evening, approximately 9:30 p.m., Gray and Melvin Tucker, both "high" from "free basing" cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store. They saw McClelland and the guard inside the store.
>
> Shortly before midnight, McClelland and the security guard left the store in separate automobiles. Gray and Tucker followed them in Gray's automobile, which Gray was driving. McClelland and the guard went to a fast-food restaurant. McClelland went inside the restaurant, and the security guard went through the "drive-thru" and then left. When McClelland left the restaurant, he drove toward Smithfield. Gray and Tucker continued to follow him. At a stop sign at the intersection of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his automobile in front of McClelland's car and blocked McClelland's way. Gray, armed with a .32-caliber revolver, directed McClelland to get out of his automobile and into Gray's. Gray struck McClelland, and the two men took McClelland's wallet and threatened to harm his family if he did not cooperate. Gray then drove Tucker and McClelland back to the Murphy's Mart Store.
>
> When they arrived at Murphy's Mart, Gray forced McClelland at gunpoint into the store while Tucker waited outside in Gray's automobile. Approximately one-half hour later, Gray and McClelland emerged from the store with a shopping cart containing three gym bags filled with money. Gray, Tucker, and McClelland put the gym bags in the back seat of Gray's

automobile and McClelland was told to get back into the car.

Gray then drove to a service station to obtain gasoline. He put some gas in the tank of the car and filled a gas can that was in the car's trunk.

After paying for the gas purchase, Gray drove McClelland and Tucker to the Frederick Campus of Tidewater Community College. After passing the college, Gray backed the car down a small side road and ordered McClelland out of the car. Gray then took McClelland to a place approximately 15 to 20 feet behind the automobile and ordered him to lie down on the ground. McClelland obeyed Gray's command.

McClelland begged Gray not to hurt or shoot him, and Gray assured him that he would not be harmed. As McClelland lay face down on the ground, Gray fired six pistol shots in rapid succession into McClelland's head from a distance of 3 to 18 inches. Gray told Tucker as they drove away that he had had to kill McClelland because McClelland knew him.

Gray and Tucker then drove to the intersection where they had left McClelland's car. Gray told Tucker that he was going to burn McClelland's car to destroy evidence. Gray took the can of gasoline from the trunk of his car and doused the interior of McClelland's automobile with gasoline. He lit a match, threw it into McClelland's car, and closed the door. Gray and Tucker subsequently returned to Gray's apartment to count the stolen money, which amounted to between $12,000 and $13,000.

Some days later, Tucker and Gray went to the Nansemond Treatment Plant where Tucker was employed, and Gray threw the revolver into a contact tank. The police later recovered the revolver after Gray showed them its location.

The police discovered McClelland's body at the scene of the crime on the morning of May 3 just a few hours after he had been shot. An autopsy performed later that day established that McClelland had received six close-range .32 caliber gunshot wounds to the head, any one of which could have caused his death.

233 Va. at 340-42, 356 S.E.2d at 172-73.

During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.

Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that the two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.

A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the cause of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

233 Va. at 345-46, 356 S.E.2d at 175.

> [T]he evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

* * *

Gray, 28 years old at the time of his trial, has a criminal record dating to 1973. In August 1973, while a juvenile, he was found not innocent of petit larceny and ordered to complete one year of supervised probation. In January 1976, as an adult, Gray was convicted of burglary in Los Angeles, California. For this conviction, he served four days in jail and was placed on probation for one year.

In March, 1977, Gray was convicted of disturbing the peace and resisting arrest in the City of Portsmouth, for which he was fined $10.00 and sentenced to five days in jail. The jail sentence was suspended on the condition that he be of good behavior for 12 months.

In May 1978, also in the City of Portsmouth, Gray was found guilty of malicious wounding, attempted robbery, and use of a firearm. He was sentenced to a total of 21 years in prison. In August 1983, he was released on parole. Gray was on parole at the time he committed the offenses involved in these appeals. He also has been convicted of possession of marijuana with intent to distribute and possession of cocaine.

From November 1983 to May 1984, while on parole, Gray worked at Morrison's Cafeteria. William Palmer, general manager of the cafeteria, testified that Gray's employment was terminated because of his use of profanity. Palmer stated that Gray had a "bad attitude." Thaddeus Eley, a chef at the cafeteria, testified that Gray had told him that he "could kill" Palmer for firing him.

Ronald Whitte testified that in July 1977, while he, his wife, and two small children were bicycling, Gray and another man accosted them. Gray displayed a pistol, ordered Whitte to halt, threatened to kill Whitte, and demanded money from him. When Whitte refused to comply, Gray fired several shots from the pistol, wounding Whitte in the arm and foot.

Lawrence Tucker, who is Melvin Tucker's brother and a convicted felon, testified that, in May 1985, he had overheard Gray recount to Melvin the details of Gray's robbery of the Circle Seafood Restaurant. Gray related the incident to relieve Melvin Tucker's concerns about the Murphy's Mart robbery. Lawrence Tucker stated, "[H]e told Melvin don't worry about it, because he got away with something like that and he can get away with this."

Melvin Tucker testified that Gray told him "he had took the Circle Restaurant off" and showed Tucker the money taken in that robbery. Melvin Tucker also testified that, within a week after the Murphy's Mart robbery, he and Gray heard a rumor that a young woman had been talking about the incident. When they saw the woman on the street, Gray told Tucker that if "she keep on running her mouth [I'm] going to fuck her up."

> Sylvester Joyner and Gray were both incarcerated in the same cell block in the Suffolk City jail. Joyner testified that Gray told him that he had to leave California because "he had killed a guy out there." The jury also heard evidence pertaining to the Sorrell murders, which has been discussed in the preceding section.

233 Va. at 347-48, 356 S.E.2d at 176-77.

Gray's pro se petition for certiorari review in this Court was denied on October 5, 1987. Gray v. Virginia, 484 U.S. 873 (1987).

In July, 1988, Gray filed in the Circuit Court for the City of Suffolk a petition for a writ of habeas corpus alleging 20 claims. Gray twice sought and was granted leave to file amendments adding additional claims to his state habeas petition. One of his claims contended that the circuit court had erred in admitting the evidence describing the Sorrell murders, but in his oral argument in the state habeas court on respondent's motion to dismiss, Gray expressly told the court that his Sorrell murders claim was a "legal claim" which did not require any new evidence to be taken in support of it, other than possibly evidence concerning its effect on the jury. The circuit court dismissed all Gray's claims without an evidentiary hearing, and entered final judgment in favor of respondent on May 14, 1990.

In his petition for appeal to the Supreme Court of Virginia from the denial of habeas corpus relief, Gray never contended that the circuit court erred in denying him an evidentiary hearing on his Sorrell murders claim, but simply urged the Supreme Court to revisit its decision on direct appeal that evidence of the unadjudicated Sorrell murders had been properly admitted in his trial. The Supreme Court of Virginia refused Gray's petition for appeal in a final order entered January 11, 1991. This Court again denied certiorari review on May 28, 1991. Gray v. Thompson, 111 S. Ct. 2250 (1991).

Gray filed his federal habeas petition in the Eastern District of Virginia on November 26, 1991. In his federal petition, he stated his claim concerning admission of evidence of the Sorrell murders in the penalty phase of his trial in the most general of terms:

> Introduction of evidence at the sentencing phase of the trial that Gray had committed other crimes of violence for which he had not been adjudged guilty violated his constitutional rights under the Fifth, Eighth and Fourteenth Amendments.

There followed a broad recitation of factual allegations with only the following conclusory statement to suggest a legal theory upon which the factual allegations might support habeas corpus relief:

> The use of proof that Gray was involved with the murders of Lisa and Shanta Sorrell was outrageously unfair, and highly prejudicial to Gray and violated his constitutional rights under the Fifth, Eighth and Fourteen Amendment rights [sic].

On April 1, 1993, the district court issued a final order and memorandum opinion dismissing Gray's federal petition. Gray subsequently filed a motion to alter or amend judgment which the district court granted in part. In its memorandum opinion of May 26, the district court affirmed each of its rulings of April 1 but discerned the following additional claim which, according to the district court, required an evidentiary hearing:

> On the morning the trial commenced, the Commonwealth's Attorney told Gray's counsel that he would present "statements" made by Gray to third parties that he committed the murders of a mother and daughter, Lisa and Shanta Sorrell. Immediately after the guilt phase of the trial, Gray's counsel was informed that the Commonwealth would present color photographs of the victims and detailed testimony of the autopsies and circumstances of the murders the next day, during the penalty phase, to prove that Gray had also committed the Sorrell murders.
>
> The Sorrells were murdered in December, 1984, twelve months before Gray was tried and convicted of the murder of Richard

> McClelland. At the time of Gray's trial, these murders remained unsolved. The only evidence that Gray committed these crimes was the testimony of Melvin Tucker, Gray's co-defendant, that after the McClelland murder, Gray also told him that he had killed the Sorrells.
>
> The next day, during the penalty phase, Tucker was permitted to recount Gray's alleged confession to the Sorrell murders for the jury. With nothing more than this to link Gray to the crimes, the Court, as noted above, then permitted the prosecution to put before the jury every graphic detail of the Sorrell murders, even though Gray had never been charged or convicted of such crimes.

Respondent then filed a motion for summary judgment on this new "claim." In the alternative, if summary judgment was denied, the respondent moved the court to permit an interlocutory appeal under 28 U.S.C. § 1292(b), and if that was denied, to enter an order in limine clarifying the issue to be tried at a plenary hearing, and specifying the nature of evidence that would be material to the issue. On September 8, 1993, the district court issued an order and memorandum opinion denying respondent any relief on this motion, but stating that the evidentiary hearing was to address the issue of "whether the evidence presented in regard to the Sorrell murders was in fact reliable."

On March 11, 1994, respondent filed a second motion for summary judgment specifically addressing the issue identified by the district court on September 8, 1993. At the outset of the evidentiary hearing on April 21, 1994, the district court announced that respondent's second motion for summary judgment "ha[d] not been granted," and that the issue to be decided at the evidentiary hearing was not confined to the factual reliability of Melvin Tucker's testimony about Gray's admission of responsibility for the Sorrell murders, but would be substantially broader.

In its final order of August 25, 1994 granting habeas corpus relief, the district court concluded that the trial court's decision to admit the Sorrell crime scene photographs, autopsies,

and the testimony of Detective Slezak describing the Sorrell crime scene, as to which Gray claimed surprise but in which he never alleged or proved any factual inaccuracy or unreliability, prevented Gray from effectively cross-examining Melvin Tucker, whose testimony Gray claimed was false, but as to which Gray did not and could not claim surprise. The district court then concluded that, although Melvin Tucker had testified in person and been cross-examined in the presence of the jury, the purported defect which the court had found rendered the "Sorrell murders" evidence as a whole constitutionally "unreliable."

The respondent appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, and Gray cross-appealed the district court's denial of relief on several of his other habeas claims. On June 28, 1995, the Fourth Circuit issued its published opinion reversing the district court's grant of habeas relief on the Sorrell murders claim and affirming its denial of relief on all of Gray's other claims. With respect to the Sorrell murders claim, the Fourth Circuit held that the district court's ruling had not been compelled by Gardner v. Florida, 430 U.S. 349 (1977), upon which it was purportedly based, that other precedent existing at the time Gray's conviction became final counseled affirmatively against the district court's decision, and that Gray's contention with respect to the Sorrell murders' evidence "rings hollow on its facts." Gray v. Thompson, 58 F.3d 59, 66 (4th Cir. 1995).

Judge Hall's concurring opinion, while it disagreed with the majority on the application of the new rule doctrine, would have rejected Gray's claim in any event because he "clearly failed to request that evidence regarding this matter be taken by the state habeas court," and the claim would therefore "be procedurally barred by the rule in Keeney v. Tamayo-Reyes, 504 U.S. 1 [parallel citations omitted] (1992)." 58 F.3d at 68 (Hall, J., concurring).

With respect to Gray's present claim based on Brady v. Maryland, 373 U.S. 83 (1963), the district court ruled this claim procedurally barred and meritless. Gray never appealed that ruling to the Fourth Circuit and, understandably, the Court of Appeals' opinion never addressed this claim.

The Fourth Circuit rejected Gray's attack on Virginia's "vileness" aggravating circumstance, finding that the statute, together with the narrowing definitions announced in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), satisfied this Court's requirements established in Godfrey v. Georgia, 446 U.S. 420 (1980).

ARGUMENT

I. NO ISSUE WORTHY OF CERTIORARI REVIEW IS PRESENTED BY THE FOURTH CIRCUIT'S ROUTINE APPLICATION OF THE NEW RULE DOCTRINE.

In Caspari v. Bohlen, this Court made clear that federal courts must analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, when the respondent so argues. 114 S.Ct. 948, 953 (1994). The Fourth Circuit followed this mandatory framework, which the district court had overlooked, and correctly found that Gray's rule "would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final." 58 F.3d at 64.

The impermissible "new rule" created by the District Court in this case is threefold: first, it would have imposed a constitutional requirement that state prosecutors disclose to defendants in advance individual items of evidence to be offered by the prosecution at sentencing to prove unadjudicated acts of misconduct on the part of the defendant; second, it would have

permitted federal habeas corpus relief to be granted based on the prosecution's failure to disclose such evidence, no matter how reliable, if the petitioner contends that its advance disclosure would have been helpful to him in cross-examining a witness whose testimony had in fact been disclosed to him in advance; third, it would have permitted a federal habeas court to second-guess a jury's determination of the credibility of a live witness who was cross-examined in the presence of the jury, based upon rumors, hearsay, and innuendo which trial counsel had notice of, but deemed unworthy of investigation, but which federal habeas counsel chose to present years later in an attempt to impugn the witness' testimony.

The district court's ruling purportedly was based on Gardner v. Florida, and on Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454 (1981), which itself was based on Gardner. Gardner, of course, held unconstitutional a sentencing proceeding in which the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain." 430 U.S. at 362. As the Fourth Circuit held in this case:

> Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was afforded the chance to cross-examined the adverse witnesses [citation omitted]. Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating as to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner had an opportunity to explain or deny the evidence. This case is thus distinguishable from Gardner on first principles.

58 F.3d at 64 (emphasis in original).

"Gardner itself warned against broad expansions of its holding." Gray, 58 F.3d at 64. Cautioning that its conclusion that due process applied in the sentencing process "does not, of course, implicate the entire panoply of criminal trial procedural rights," 430 U.S. at 358, n.9, Gardner found "a significant" distinction in the situation considered in Williams v. New York, 337 U.S. 241 (1949), wherein the sentencing judge had described in detail in open court the information in the presentence report upon which he relied. 430 U.S. at 356.

Moreover, in Sawyer v. Smith, 497 U.S. 227 (1990), this Court rejected a petitioner's reliance upon Gardner for the general proposition of "reliability in capital sentencing" as dictating the result later reached in Caldwell v. Mississippi, 472 U.S. 320 (1985), cautioning that "the [new rule] test would be meaningless if applied at this level of generality." 497 U.S. at 236. Clearly, the same is true of Gray's suggestion that the rule he advocates was dictated by Gardner.

Smith v. Estelle, decided prior to the announcement of this Court's new rule jurisprudence, expanded on Gardner by holding that "[s]urprise can be as effective as secrecy in preventing effective cross-examination." 602 F.2d at 699. The Fourth Circuit's conclusion that, in light of Teague, it was no longer free to make the same "leap in extending Gardner" made by the Fifth Circuit in Estelle, was a routine and clearly correct application of the new rule doctrine. See Gray, 58 F.3d at 65.

Such decisions as Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983), show that at the time of Gray's case, reasonable judicial minds could conclude that Gardner does not dictate the result reached in Estelle, or by the district court in this case. This conclusion is further supported by the Fourth Circuit's correct observation that

other precedent existing at the time Gray's conviction became final counseled affirmatively against extending Gardner to require advance notice as did the district court. See Weatherford v. Bursey, 429 U.S. 545 (1977) (no general constitutional right to discovery in a criminal case); United States v. Agurs, 427 U.S. 97 (1976) (mere possibility that an item of undisclosed information might have helped the defense does not establish materiality in the constitutional sense).

Gray's reliance on Blackmon v. Scott, 22 F.3d 560 (5th Cir.), cert. denied, 115 S.Ct. 671 (1994), and Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S.Ct. 915 (1995), to show a supposed split in the circuits is misplaced. There is no indication in Blackmon that the State raised a "new rule" defense or that the Fifth Circuit conducted a "new rule" analysis. Both Blackmon and Paradis, moreover, showed circumstances much closer to Gardner, in which the defendant was indeed denied a meaningful opportunity to rebut the evidence against him. In Blackmon, the State concealed some of its witnesses from the defense before trial and interfered with the defense opportunity to interview another witness. 22 F.3d at 563. Blackmon, like Gray, argued that "due to the lack of adequate notice [that evidence of unadjudicated misconduct would be used against him in the penalty phase], the State had a duty under Brady to produce the prior testimonies of [its witnesses]." 22 F.3d at 566, n.21. The Fifth Circuit rejected this argument, ruling that Blackmon had showed "no legal basis" for it. Id. Paradis involved the sentencing judge's consideration of hearsay statements and in camera statements from a declarant whom the defense was not given the opportunity to cross-examine. 20 F.3d at 956.

Gray's case is not a proper vehicle for resolving a supposed "conflict" for other reasons as well. First, as the Fourth Circuit held, "petitioner's contention rings hollow on its facts." 58 F.3d at 66. Gray knew in advance of trial that the prosecution would use Tucker's testimony to implicate Gray in the Sorrell murders, and his advance knowledge of the additional evidence presented to prove that the murders actually occurred was neither necessary nor helpful in his attempt to cross-examine Tucker and impeach Tucker's testimony. Id.

Second, as observed by Judge Hall in his concurring opinion, Gray clearly failed to request that evidence regarding his Sorrell murders claim be taken by the state habeas court, and his claim as presented in district court was thus procedurally barred.

In oral argument on the respondent's motion to dismiss in the Circuit Court of the City of Suffolk, Gray's state habeas counsel expressly characterized this claim as a legal claim for which no evidence was necessary:

> We have here two types of claims in my petition, Your Honor, that are there as one--one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and legality of those claims, which are simply matters of law to be argued before the Court here today.

(Resp. App. 4-5).

The first of the claims thus characterized pertained to the use of the testimony of Jeremiah Smallwood. The District Court denied relief on that claim.

The second claim thus characterized, however, was the Sorrell claim for which the District Court granted habeas relief based on evidence proffered for the first time in federal court:

> Now the second most -- again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest -- and when I say electrifying, I am not using the term lightly -- one that had an impact on those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and evidence concerning the Sorrell murders in Chesapeake.

(Resp. App. 6).

Later in his argument, apparently as an afterthought, state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim from the ineffective assistance of counsel claims which required evidence to establish the claims themselves:

> But those two grounds, [i.e., Smallwood's testimony and the Sorrell evidence] Your Honor, I would suggest are legal claims that certainly require those -- a petition for -- require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.
>
> Finally, Your Honor, there is one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the court.

(Resp. App. 7).

The state habeas court denied Gray's Sorrell claim as having been adjudicated on direct appeal. See Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970). In his petition for appeal of the habeas ruling to the Supreme Court of Virginia, Gray urged the Supreme Court to reexamine its ruling on direct appeal rejecting the claim as a matter of law. He argued the merits of the claim as a matter of law, but never contended that the circuit court should have taken evidence

on the claim.

Thus, in state court, the only evidence Gray ever proffered as material to the Sorrell claim was evidence pertaining to its effect on the jurors. Even the rejection of this proffer, however, was waived in state habeas appeal when it was not assigned as error. See Whitley v. Bair, 802 F.2d 1487, 1502 (4th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Because Gray presented his Sorrell claim in state court as one which required no evidentiary hearing, federal habeas relief premised upon the evidence that was proffered for the first time at the federal evidentiary hearing is barred. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992); Castille v. Peoples, 489 U.S. 346, 351 (1989). Thus, even if Gray's claim could survive the "new rule" doctrine, it could not survive the procedural default doctrine.

II. GRAY'S CLAIM BASED ON BRADY IS NOT PROPERLY BEFORE THIS COURT, IS PROCEDURALLY BARRED, AND IS WITHOUT MERIT.

The district court ruled that defendant's Brady claim was procedurally defaulted and without merit. Gray never appealed the district court's denial of relief on his Brady claim. He mentioned the issue only in a footnote in his Fourth Circuit brief in support of his contention that Gray's ability to prepare for the cross-examination of Tucker was undermined by the lack of advance notice of the evidence that would be presented. (Resp. App. 1-3). His present claim is thus not properly before this Court.

As the District Court had correctly found, moreover, Gray's Brady claim is procedurally barred and meritless. It is barred because it was never raised at trial, on direct appeal, or in state habeas corpus. The claim would be barred from state habeas relief under Virginia Code

§ 8.01-654(B)(2). Consequently, the claim is barred from federal habeas review as well. See Teague v. Lane, 489 U.S 288 (1989).[1]

The claim is also without merit. All of the "information" which the District Court characterized as "suggest[ing] that Mr. Gray was not involved in the Sorrell murders," was either inadmissible, immaterial, of equal access to Gray and thus not required to be disclosed under Brady, or simply wrongly interpreted by the District Court. None of this information, therefore, could justify habeas corpus relief even if Gray's Brady claim were not procedurally barred. See United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983) (government not required under Brady to disclose hearsay); United States v. Polowichak, 783 F.2d 410, 414 (4th Cir. 1986) (government not required under Brady to disclose evidence based on pure speculation); United States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989), cert. denied, 494 U.S. 1008 (1990) (inadmissible information is not Brady material); United States v. Bagley, 473 U.S. 667 (1985) (withheld evidence immaterial under Brady unless it presents a reasonable probability of a different outcome); Stockton v. Murray, 41 F.3d 920, 927, (4th Cir. 1994) ("Brady does not compel the disclosure of evidence available to the defense from other sources, including diligent investigation by the defense"), cert. denied, 116 S.Ct. 37 (1995); United

[1] Indeed, the evidence at the federal evidentiary hearing showed that the so-called exculpatory evidence, consisting of police suspicions about Timothy Sorrell, were widely publicized well before Gray's death sentence became final in the Circuit Court, and thus could have been investigated and presented as the basis of a Brady claim in support of a motion for a new trial and on direct appeal. Nevertheless, trial counsel admitted they did not present these matters in support of a Brady claim in a motion for a new trial. The Brady claim would thus now be barred from state habeas review under Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), for Gray's failure to present it at trial and on direct appeal, and under Virginia Code § 8.01-654(B)(2) for Gray's failure to present it in state habeas corpus.

States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990) (same holding); Maynard v. Dixon, 943 F.2d 407, 418 (4th Cir. 1991) (hearsay information which does not lead to the discovery of hard, admissible evidence does not constitute Brady material).

III. NO ISSUE WORTHY OF CERTIORARI REVIEW IS PRESENTED BY GRAY'S ATTACK ON VIRGINIA'S "VILENESS" AGGRAVATING FACTOR.

Virginia law provides that a jury may fix a defendant's sentence at death if it finds that his conduct "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Virginia Code § 19.2-264.2(1). "Depravity of mind" is defined as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). An "aggravated battery" is "a battery which, qualitatively and quantatively, is more culpable than the minimum necessary to accomplish an act of murder." Id., 219 Va. at 478, 248 S.E.2d at 149.

As the Fourth Circuit held, the trial court in this case "gave the Smith definitions to the jury essentially verbatim," 58 F.3d at 63, and the statutory formula and limiting definitions have been approved by the Fourth Circuit in numerous previous cases in which this Court has denied certiorari review. See Turner v. Williams, 35 F.3d 872, 891-92 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1994); Jones v. Murray, 976 F.2d 169, 174-75 (4th Cir.), cert. denied, 113 S.Ct. 27 (1992); Jones v. Murray, 947 F.2d 1106, 1117 (4th Cir. 1991), cert. denied, 503 U.S. 973 (1992); Boggs v. Bair, 892 F.2d 1193, 1197 (4th Cir. 1989), cert. denied, 495 U.S. 940 (1990); Turner v. Bass, 753 F.2d 342, 350-53 (4th Cir. 1985), reversed in part on other grounds, 476 U.S. 28 (1986). What was not worthy of certiorari review in any of these prior

cases is no more worthy of such review here. Moreover, for the Court of Appeals or this Court to reach an opposite conclusion on the constitutionality of the same aggravating factor would be the quintessence of a new rule, prohibited by Teague. In addition, Gray's challenge to Virginia's "vileness" aggravating factor does not implicate the constitutionality of his death sentence.

At the guilt stage of a Virginia capital trial, the prosecution must prove not only that the defendant committed a premeditated murder, but also that the murder was committed in one of several enumerated aggravating circumstances. See Va. Code § 18.2-31. In petitioner's case, he was convicted of premeditated murder during the commission of robbery. See Va. Code § 18.2-31(4).

At the penalty phase of a Virginia capital murder trial, moreover, before the defendant even becomes eligible for a death sentence, the prosecution must prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" and/or that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or any aggravated battery to the victim." See Va. Code § 19.2-264.4C. In petitioner's case, the jury found the existence of both "future dangerousness" and "vileness." Even then, however, the jury was free under Virginia law and the court's instructions to impose a life sentence rather than a death sentence.

Aggravating factors are not ends unto themselves; their constitutional function is to narrow the class of those eligible for a death sentence beyond those who commit any murder. Lowenfield v. Phelps, 484 U.S. 231, 244-246 (1988). In Virginia, this limiting function is

accomplished at the guilt stage when the defendant is convicted of a narrow species of capital murder. Thus, when petitioner was convicted of three separate species of premeditated murder, no further narrowing was constitutionally required. See Gregg v. Georgia, 428 U.S. 153, 164 n.9 (1976) (approving constitutionality of state system where aggravator to be proved at penalty stage is that murder was committed during rape). Accordingly, even if petitioner's claim regarding Virginia's "vileness" aggravator had merit -- and clearly it does not -- it would raise only a matter of state law and would not affect the constitutionality of his death sentence. See generally Michigan v. Long, 463 U.S. at 1038 (no jurisdiction to review state law issues on certiorari).

Moreover, Virginia is a "non-weighing" State where aggravating circumstances do not play a decisive role in the jury's determination whether to impose a death sentence. See Swann v. Commonwealth, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, cert. denied, 115 S.Ct. 234 (1994). In Williams' case, in addition to finding "vileness," the jury also found the "future dangerousness" aggravator. (Pet. App. 2a). Thus, even if, hypothetically, Virginia's "vileness" factor were vague, the remaining "future dangerousness" factor would be sufficient to sustain his death sentence. See Stringer v. Black, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). See also Zant v. Stephens, 462 U.S. 862, 884-891 (1983).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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prepare Gray's defense, 2) Commonwealth's Attorney Ferguson turned over none of the evidence tending to prove that Timothy Sorrell committed these murders, even though the trial court ordered him to disclose his exculpatory evidence[10], 3) at the beginning of the trial, Ferguson made an unequivocal promise to introduce only statements Coleman Gray had made about other crimes he committed, but 4) trial counsel learned only on the eve of the sentencing hearing that Ferguson intended to break his promise and instead present to the jury the testimony of the investigating officer in the Sorrell case, to describe the Sorrell murder scene and display graphic photographs of the victims, and the testimony of the medical examiner to describe the cause of death and the nature and extent of the Sorrells' injuries and to display autopsy photographs.

The Commonwealth's assertion also ignores that, if his defense attorneys possessed the evidence concerning Timothy Sorrell (either in response to their Brady motion or through diligent investigation after adequate notice), they could have challenged the truth of Tucker's

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[10]The Commonwealth attempts to divert the Court's attention by suggesting that the federal district court is engaging in a ruse by using this claim to reach a procedurally defaulted Brady claim. Commonwealth's Brief at 49-51. This is untrue. Although the Court's opinion contains an implicit finding that the prosecutor committed a Brady violation (A. 937, 943), the Court based its decision on the fact that the prosecutor ambushed defense counsel by waiting until the eve of the penalty phase to reveal his plan to conduct a full-blown trial of the Sorrell murders. Given sufficient time to prepare, defense counsel could have uncovered much of the Timothy Sorrell evidence through a diligent investigation, starting with an interview of Detective Slezak.

In any event, Ferguson violated Brady by failing to disclose the Timothy Sorrell evidence. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), he was obligated to turn over this information because it was "favorable to [the] accused .. and material to ... punishment." This Court's holding in Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994) is inapplicable, because Gray's counsel was denied the opportunity to conduct a "diligent investigation." Moreover, the district court erred in holding that Gray's Brady claim was barred from federal review. See Gray Memorandum in Response to Respondent's Motion to Dismiss at 10-12.

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jewelry and tote bags and other personal effects of Mr. Gray that were seized in the search in this particular case. And the purpose of them being introduced in evidence, presumably was to establish that this indeed was jewelry and other items that were stolen by Mr. Gray from the K-Mart where Mr. McClelland worked. And these -- the introduction of these photographs were not objected to by trial counsel and that's -- I wanted to identify those photographs. They are not in the appendix simply because for some reason they apparently -- Well, they did not become part of the appellate record because they were never objected to and there was no ruling ever made at the trial level to make them a pertinent portion of the record for the appeal.

If I might, Your Honor, respond now to Mr. Ferguson's argument.

We have here two types of claims in my petition, Your Honor, that are there as one -- one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and the legality of those claims, which are simply

matters of law to be argued before the Court here today.

Of all of those claims -- and Mr. Ferguson has gone through all of them on his motion -- without arguing at length each one, they are all set forth in the petition for habeas corpus and the two motions to amend.

I would point out that two of them, Your Honor, that I certainly would submit are critical to the proper consideration of this habeas corpus petition, the first one is the use of the testimony of Jeramiah Smallwood. To be sure, there is precedent that even if Mr. Smallwood's testimony was perjured, that it could be used. But in this particular case the -- I'd like to comment on the effect of Mr. Smallwood's testimony. The effect that can be gleened from a reading of the record by someone who was not present at the trial of this case, and also another effect.

A reading of the record would indicate -- Well, first I want to point out Mr. Smallwood's testimony was made -- was given, Your Honor, in the guilt phase of the trial. Not in the sentencing phase. Mr. Smallwood testified that he had a conversation with Mr. Gray in prison following all of

murderer. It's the manner in which Smallwood inflamed the jury through his unnecessary testimony.

And Your Honor, that seems to me that this is -- that is one of the most compelling legal reasons to grant a writ of habeas corpus in this particular case. And that there can be evidence adduced at an evidentiary hearing on this petition to establish the effect in the courtroom and the effect, the likely effect on the jury, that Mr. Smallwood's perjured testimony had. And if that were indeed the case, if his perjured testimony had this effect on the jury, or even likely could have had this effect on the jury, then Mr. Gray's -- then the jury's finding of guilt would certainly seem, it seems to me, to be defective.

Now the second most -- again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest -- and when I say electrifying, I'm not using the term lightly -- one that had an impact on those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake. In essence what the Commonwealth did in order to prove that Gray was -- had future dangerousness and

Sorrell case, the introduction of that evidence, from the Sorrell case in Chesapeake, was just simply -- You know, to say it was unfairly prejudicial to Mr. Gray I would submit is an understatement, and I won't comment beyond that further. But those two grounds, Your Honor, I would suggest are legal claims that certainly require those -- a petition for -- require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

Finally, Your Honor, there's one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the Court. Because not only must we establish that the assistance of counsel that Mr. Gray had at the trial was not reasonably effective, which would require evidence, but we also must establish that but for relationship, that but for the ineffective assistance of counsel, the result at trial would be

COMMONWEALTH of VIRGINIA

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November 22, 1995

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Coleman Wayne Gray v. Commonwealth
No. 95-6510

Dear Mr. Suter:

Please find enclosed the original and ten copies of Respondent's Brief in Opposition, to be filed on behalf of the respondent in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

John H. McLees, Jr.
Assistant Attorney General
Criminal Litigation Section

Enclosures

cc: Paul G. Turner, Esquire
Donald R. Lee, Jr., Esquire
Counsel for petitioner

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No. 95-6510

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

CERTIFICATE OF SERVICE

I, John H. McLees, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of November, 1995, I mailed, first-class postage pre-paid, an original and eleven (11) copies of the Brief in Opposition to Petition for Writ of Certiorari to the Clerk of this Court and one copy of the same to Paul G. Turner, Assistant Federal Public Defender, P. O. Box 25967, Raleigh, North Carolina 27611-5967, and Donald R. Lee, Esquire, Virginia Capital Representation Resource Center, 1001 East Main Street, Suite 510, Richmond, Virginia 23219-0506, counsel for petitioner.

John H. McLees, Jr.
Assistant Attorney General

REPLY BRIEF

EDITOR'S NOTE

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IN THE

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COLEMAN WAYNE GRAY,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

In Brown v. Allen, 344 U.S. 443 (1953), Justice Black admonished that "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." Id. at 554 (dissenting opinion). In this case, the Commonwealth's Attorney obtained a death sentence for Coleman Gray in flagrant defiance of his due process rights, by presenting him to the jury as probably guilty of the Sorrell murders, while withholding evidence tending to show that Gray probably was innocent. Gray's federal claim challenging the action of the Commonwealth's Attorney was properly before the District Court, and it vacated his death sentence.

The Circuit Court was able to reverse the District Court only by ignoring its own prior decisions and the decisions of this Court concerning the scope of the Teague doctrine to hold that Gray impermissibly sought to create a new rule of federal constitutional law. To the contrary, Gray sought only to have general principles of due process of law, long established in this Court, applied to the egregious facts of his case. Contrary to the representations of the Commonwealth, the Circuit Court's application of the Teague doctrine to Gray's claim is anything but routine - it is an unprecedented, unprincipled, result-oriented expansion of the new rule doctrine that is completely at odds with the logic of Teague, its progeny, and the Circuit Court's own prior decisions. This Court should look straight through the meritless procedural arguments made by the Commonwealth and grant its writ of certiorari to prevent Gray's execution in flagrant defiance of the Constitution.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FOURTH CIRCUIT'S OVERREACHING APPLICATION OF THE NEW RULE DOCTRINE TO REINSTATE A DEATH SENTENCE VACATED BY THE DISTRICT COURT BECAUSE THE PROSECUTOR'S TACTICS VIOLATED THE MORAL STANDARDS OF FAIR PLAY EMBODIED IN THE DUE PROCESS CLAUSE AND APPLIED BY THIS COURT IN GARDNER v. FLORIDA

The Commonwealth urges this Court to deny certiorari because the Fourth Circuit's application of the new rule doctrine in this case was merely "routine." Respondent's Brief in Opposition at 10. It is telling, however, that the Commonwealth fails even to attempt to square the Circuit Court's decision with prior decisions of the Fourth Circuit and decisions of this Court holding that a federal court does not create a new rule when it simply applies an existing rule of law designed for the specific purpose of evaluating a variety of factual contexts. Indeed, the Commonwealth ignores that the majority opinion in this case drew a pointed concurrence from a member of the panel criticizing the majority for ignoring the Fourth Circuit's own opinion in Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), cert. denied, 115 S.Ct. 1359 (1995).

In a section of Turner explaining that a federal court cannot be said to apply a new constitutional rule whenever it applies an existing normative rule to a new set of facts, the Fourth Circuit cited with approval a decision of the Ninth Circuit, referring specifically both to its holding that a Jackson v. Virginia challenge is not barred by Teague, and its holding that Teague does not bar application of Gardner's due process principles. 35 F.3d at 885 n.11 (citing Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995)). The Commonwealth's reluctance to address head-on the issue presented by Gray in his petition for writ of certiorari is understandable - the District Court merely applied the due process principles underlying the Gardner decision, that are designed specifically to evaluate

a myriad of factual contexts, to reach the conclusion that the prosecutor's actions violated Gray's due process rights.

In support of its argument that the Circuit Court's application of the new rule doctrine merely was "routine," the Commonwealth relies chiefly upon this Court's decision in Sawyer v. Smith, 497 U.S. 227 (1990). The Commonwealth represents that in Sawyer "this Court rejected a petitioner's reliance upon Gardner for the general proposition of 'reliability in capital sentencing' as dictating the result later reached in Caldwell v. Mississippi, 472 U.S. 320 (1985), cautioning that 'the [new rule] test would be meaningless if applied at this level of generality.' 497 U.S. at 236. This is a gross over-simplification of this Court's holding in Sawyer.

In Sawyer, the federal district court denied the petitioner's federal habeas corpus petition, which was based in relevant part on the argument that the prosecutor's closing argument during the penalty phase diminished the jury's sense of responsibility for the capital sentencing decision in violation of this Court's 1985 decision in Caldwell. The Court of Appeals affirmed the denial of relief, holding that Caldwell announced a new rule within the meaning of Teague and did not fall within Teague's second exception. 497 U.S. at 232-33.

In reaching its decision, this Court noted that in Caldwell it relied on several prior decisions, including Gardner, for the general Eighth Amendment proposition that capital sentencing must have guarantees of reliability. 497 U.S. at 235. The petitioner in Sawyer relied upon the cases cited by this Court in Caldwell, along with other cases, "in support of the argument that Caldwell was 'rooted' in the Eighth Amendment command of reliable sentencing, and that application of these cases to misleading prosecutorial comment '[b]y

analogy' would lead to the predictable Caldwell result." Id. at 235-36. This Court noted that its earlier Eighth Amendment cases gave only "general support to the conclusion reached in Caldwell." Id. at 236. It is only in this context that this Court stated that "[i]n petitioner's view, Caldwell was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." Id. Contrary to the representations of the Commonwealth, this Court did not hold, or even imply generally, that the new rule test would be meaningless if applied in a way that allows habeas petitioners to rely upon the specific due process principles espoused in Gardner as applied to a new set of facts.

This Court's decision in Gardner did involve, at its most general level, the Eighth Amendment principle that capital sentencing must have guarantees of reliability. Specifically, however, in Gardner this Court held that a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny, and that he must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. 430 U.S. 349, 359, 362. It is these specific principles of Fourteenth Amendment due process of law, and not the general Eighth Amendment command of reliable sentencing, that the District Court applied in reaching its decision to vacate Gray's death sentence. These specific principles of due process obviously are intended to apply to a variety of factual settings, and they obviously apply to this case. To hold otherwise would be to hold that Gardner is an anomalous decision, and that the principles of due process applied in Gardner apply only to cases with identical facts. The decisions of this Court and the other federal courts demonstrate that Gardner is not so limited

in its scope, and that these specific principles are intended to be applied by the federal courts in a variety of factual settings. The Circuit Court erred in holding that Gray's claim is barred by the new rule doctrine, and this Court should grant certiorari.

II. GRAY'S CLAIM CONCERNING USE OF THE SORRELL EVIDENCE WAS NOT DEFAULTED IN THE STATE COURTS

The Commonwealth also claims that Gray defaulted in state habeas corpus his claim concerning the use of the Sorrell evidence by the prosecutor. This is untrue. Gray did not default his claim in state court. The Commonwealth's argument is yet another of the illusory procedural screens it attempts to erect to divert this Court's attention from the merits of Gray's claim.

The Commonwealth asserts that the federal district court erred in granting an evidentiary hearing to consider Gray's claim. The essence of its argument is that Gray defaulted his right to a federal evidentiary hearing on his claim by failing to ask for a hearing during the state habeas proceedings. This argument is fatally flawed as a matter of fact and as a matter of law. On the facts, the Commonwealth claims that state habeas counsel represented to the state court that it did not need to take evidence upon the claim. State habeas counsel, however, clearly and expressly stated to the habeas court that he needed an evidentiary hearing on this issue. Indeed, the Commonwealth acknowledges that counsel requested an evidentiary hearing, but it urges this Court to ignore this unequivocal request because it was "apparently [] an afterthought." Respondent's Brief in Opposition at 15. Review of the transcript reveals that it was not an afterthought. Respondent's Appendix 7. Even if it was, however, it nevertheless was a request for an evidentiary hearing, and Gray

was entitled to an evidentiary hearing in the District Court.

The Commonwealth relies upon Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992), to argue that the federal district court erred in conducting an evidentiary hearing on this claim if state habeas counsel represented to the state court that it did not need to take evidence upon the claim. Respondent's Brief in Opposition at 16. Assuming for the sake of argument that state habeas counsel made this representation in state court, the Commonwealth still is mistaken. Neither Keeney nor any other case cited by the Commonwealth limits the discretion of a federal district court to hold a hearing upon any federal habeas claim even if one is not required.

In Townsend v. Sain, 372 U.S. 293 (1963), this Court delineated the circumstances in which a habeas petitioner is entitled to an evidentiary hearing as a matter of right. This Court also recognized, however, that a federal district court has discretion to hold a hearing in every case in which a factual dispute exists:

> The purpose of the [Townsend] test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318 (emphasis added).

Keeney overruled a single aspect of Townsend. If a habeas petitioner has received an evidentiary hearing on his claim in state court, a hearing is now required in federal court only when the petitioner can establish cause for his failure to develop an adequate record

below and prejudice resulting from that failure; it no longer suffices to show merely that he did not deliberately bypass the opportunity to present facts in the state forum.

The rest of Townsend remains the law. In fact, in Keeney Justice O'Connor observed in dissent:

> [T]he district courts ... still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory.

112 S. Ct. at 1727 (citing Townsend, 372 U.S. at 318).

Even if Gray was not entitled to an evidentiary hearing (and he was), the District Court was well within the scope of its authority when it ordered one. The Commonwealth simply has no valid argument supporting its claim that the District Court erred in granting an evidentiary hearing in this case. Rather, the Commonwealth obviously is disappointed that Gray was able to prove his claim in the evidentiary hearing. That hearing was properly ordered by the District Court, and the Circuit Court did not make a finding that Gray defaulted his claim in state court.

The Commonwealth also represents to this Court that Gray defaulted this claim in his petition for appeal to the Virginia Supreme Court because, according to the Commonwealth, Gray only "urged the Supreme Court to re-examine its ruling on direct appeal rejecting the claim as a matter of law." Respondent's Brief in Opposition at 15-16. Again, the Commonwealth is wrong, and it is revealing that it failed to include as part of its appendix for this Court the relevant portions of Gray's Petition for Appeal to the Virginia Supreme Court. In his Petition for Writ of Habeas Corpus, Gray's Sorrell claim was designated as Claim IX. In his Petition for Appeal, Gray appealed to the Virginia Supreme Court the state habeas court's

decision to dismiss this claim. Petitioner's Appendix to Reply Brief at 4-5. In a separate section of the Petition for Appeal, Gray did argue to the Virginia Supreme Court that it should re-examine its ruling on direct appeal, but he argued to the Court that while he was "mindful of [the] court's prior ruling in his own direct appeal[, a] reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to re-examine its prior ruling accordingly." Petitioner's Appendix to Reply Brief at 9. Gray's counsel necessarily made this argument because the state habeas court had held that this claim was barred from consideration in state habeas because it had been adjudicated on direct appeal. Gray's claim properly was before the District Court, and this Court should grant his petition for writ of certiorari to review the Circuit Court's decision holding that his claim is barred by the new rule doctrine.

III. GRAY'S CLAIM THAT THE PROSECUTOR WITHHELD EXCULPATORY EVIDENCE TENDING TO PROVE THAT ANOTHER SUSPECT COMMITTED THE NOTORIOUS DOUBLE-HOMICIDE UPON WHICH THE STATE RELIED TO PROVE FUTURE DANGEROUSNESS IS PROPERLY BEFORE THIS COURT AND IS NOT PROCEDURALLY BARRED

Although it was not the primary focus of his appeal because the District Court relied primarily upon Gardner in reaching its decision, Gray did argue in the Circuit Court that the Commonwealth's Attorney's actions violated this Court's holding in Brady v. Maryland, 373 U.S. 83, 87 (1963), because he was obligated to turn over the information concerning Timothy Sorrell that was "favorable to [the] accused ... and material to ... punishment." See Appendix to Respondent's Brief in Opposition 3. After this case was briefed in the Fourth Circuit on the merits, but before oral argument, this Court decided Kyles v. Whitley, 115 S. Ct. 1555 (1995). At oral argument, counsel for Gray informed the Circuit Court of the

Kyles opinion, and described its applicability to this case. Gray also relied upon Kyles in his Petition for Rehearing and Suggestion for Rehearing In Banc to the Fourth Circuit. Petitioner's Appendix to Reply Brief at 23-26. Nevertheless, the Fourth Circuit failed to consider whether Gray was entitled to relief under Kyles.

The Commonwealth argues to this Court that it should refuse to consider Gray's Brady/Kyles claim because "[h]e mentioned the issue only in a footnote in his Fourth Circuit brief in support of his contention that Gray's ability to prepare for the cross-examination of Tucker was undermined by the lack of advance notice of the evidence that would be presented. ... His present claim is thus not properly before this Court." Respondent's Brief in Opposition at 16. Again, the Commonwealth is mistaken. Although the District Court did not cite Brady in its opinion, its decision does hold implicitly that the Commonwealth's Attorney withheld exculpatory evidence from Gray. The District Court held that there was substantial undisclosed exculpatory evidence concerning Timothy Sorrell, and it described the testimony of the Commonwealth's Attorney that no such evidence existed as "patently absurd." (A.943). Moreover, the District Court held that Gray was entitled to relief because the Commonwealth had violated his due process rights, and both Brady and Kyles hold that a defendant is entitled to disclosure of exculpatory evidence by operation of the Due Process Clause of the Fourteenth Amendment. The jurisprudence of this Court makes it clear that, while the Court will not consider claims raised for the first time on appeal or certiorari, it will consider new arguments made in support of a properly preserved claim. See Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995).

In Lebron, an artist (Lebron) who created billboards displaying commentary on public

issues filed suit claiming that the National Railroad Passenger Corporation (Amtrak) had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature. The artist was granted relief in the federal district court, but the United States Court of Appeals for the Second Circuit reversed, holding that Amtrak was not a government entity, and that therefore the Federal Government was not so involved with Amtrak that its decisions could be considered federal action. 115 S. Ct. at 964.

In this Court, Lebron argued that Amtrak was not a private entity, but instead was Government itself. Id. He presented this argument even though "he did not raise this point below; indeed he expressly disavowed it in both the District Court and Court of Appeals." Id. In the lower courts, Lebron argued that Amtrak's actions were subject to constitutional requirements because Amtrak, although a private entity, had close ties to federal entities. It was not until after this Court granted certiorari that Lebron first explicitly presented - in his brief on the merits - the alternative argument that Amtrak was itself a federal entity. Id.

Before reaching the merits of Lebron's claim, this Court first considered whether it properly was before the Court, and held that it was:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Yee v. Escondido, 503 U.S. 519, ___, 112 S. Ct. 1522, 1532, 118 L. Ed.2d 153 (1992); see also Dewey v. Des Moines, 173 U.S. 193, 198, 19 S. Ct. 379, 380, 43 L. Ed. 665 (1899). Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Lebron, 115 S. Ct. at 965.

Here, Gray argued in the District Court and the Circuit Court that the

Commonwealth's Attorney's failure to disclose the exculpatory evidence concerning Timothy Sorrell violated Brady. Indeed, the Circuit Court's opinion implicitly rejects the Brady argument, by refusing even to consider whether Gray was entitled to disclosure of this evidence. See Gray v. Thompson, 58 F.3d 59, 66 n.3 (4th Cir. 1995) ("Petitioner devotes extensive portions of his brief to Timothy Sorrell's status as an initial suspect in the Sorrell murders, arguing that had he known of that fact he could have better defused the charge leveled against him. We refuse to be dragged into a mini-trial on the respective strengths of the case against Sorrell and the petitioner. Our sole commission on collateral review is to review the state trial record for violations of federal law"). Gray's claim concerning the Sorrell murders properly was before the District Court; he consistently pressed in the courts below his argument that his due process rights under Brady also were violated, and he is entitled to press that argument in this Court.

The Commonwealth also argues that Gray's Brady/Kyles claim is without merit. The Commonwealth, however, fails even to take issue with the fact that there was substantial evidence tending to prove that Timothy Sorrell killed his wife and his daughter, none of which was disclosed to Gray. Instead, the Commonwealth merely attempts to hide behind the bald, unsupported statement that "[a]ll of the 'information' which the District Court characterized as 'suggest[ing] that Mr. Gray was not involved in the Sorrell murders' was either inadmissible, immaterial, of equal access to Gray and thus not required to be disclosed under Brady, or simply wrongly interpreted by the District Court. None of this information, therefore, could justify habeas corpus relief even if Gray's Brady claim were not procedurally barred." Respondent's Brief in Opposition at 17. This Court's decision in Kyles

demonstrates that the Commonwealth's contention plainly is wrong.

As is explained in the Petition for Writ of Certiorari, Gray's counsel could have thoroughly dismantled the Commonwealth's Sorrell case if the Commonwealth's Attorney had disclosed to them the evidence concerning Timothy Sorrell. For example, the lead detective's knowledge of the evidence concerning Timothy Sorrell would have fueled a withering cross-examination, destroying the jury's confidence in accomplice Tucker's story that Gray confessed to the crimes and raising a substantial implication that the prosecutor had coached the detective to avoid discussion of Timothy Sorrell. See Kyles, 115 S. Ct. at 1570. This cross-examination also would have demonstrated that the detective either was being less than wholly candid or that he was less than fully informed, that the investigation of the Sorrell murders was limited by the prosecution's blind acceptance of Tucker's story, and that the prosecution, police, and Tucker set up Gray. See id. at 1573, 1575. It also would have shown that Gray had an alibi known to the detective. The exculpatory evidence withheld by the prosecutor undoubtedly was material, and the Fourth Circuit should have affirmed the District Court's grant of the writ of habeas corpus, even based on Brady and Kyles alone. This Court should grant certiorari to review the Fourth Circuit's decision.

CONCLUSION

As we near the twenty-first century, it should be a truism that a man on trial for his life has a constitutional right to prepare a meaningful defense to the state's case for death. Through the Due Process Clause of the Fourteenth Amendment, our federal district courts largely have condemned the archaic practice of "trial by ambush," especially in capital cases. According to the Commonwealth of Virginia, however, Coleman Wayne Gray had no right at

all to defend himself against the charge that he was responsible for one of the most notorious double-homicides in the history of Tidewater, Virginia. The paramount duty of the Suffolk Commonwealth's Attorney was not to obtain a death sentence in this case - it was to ensure that Coleman Gray received a fair trial. Instead, he ambushed Gray and his lawyers. First he broke a promise to introduce only "statements" that Gray allegedly made concerning unadjudicated crimes, including the Sorrell murders. Then, he presented the gruesome Sorrell murder evidence to the jury, even though there was substantial evidence tending to prove that someone else had committed the crime, and almost no evidence linking Gray. Gray probably was innocent of these crimes, but the Commonwealth's Attorney presented him to the jury as probably guilty. It is an understatement to say that this is not due process of law.

The Commonwealth maintains to this day that it acted fairly in this case, honoring Gray's constitutional right to due process of law. The District Court decided, however, that the Commonwealth's "tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The Circuit Court side-stepped the merits of this holding, by fashioning an overbroad, overreaching formulation of this Court's new rule doctrine to hold that the District Court impermissibly created a new rule of federal constitutional law. This decision, if allowed to stand, will encourage the federal courts to refuse to reach the merits of most constitutional claims raised by federal habeas petitioners, and instead to defer at all costs to state court decisions. This is not the intent of the new rule doctrine and this Court should grant certiorari to review the Fourth Circuit's decision.

Respectfully submitted,

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PETITIONER'S APPENDIX TO REPLY BRIEF

IN THE
SUPREME COURT OF VIRGINIA

COLEMAN WAYNE GRAY,

Appellant

v.

CHARLES E. THOMPSON, Warden

Appellee

PETITION FOR APPEAL

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1491(1982), treated the same issue, but in the context of a retrial, rather than habeas corpus and thus is not in point.

Moreover, the trial judge did not make any affirmative statement of his ability to try the case free of bias or prejudice. (Tr. at 6). The trial judge thus abused his discretion in denying Gray's Motion. Justus, supra, 222 Va. at _____, 283 S.E. 2d at 908.

II. The Trial Court Erred in Dismissing Gray's Claims I, II, V, VI, IX, XI, XII, XVI and XIX as Being Procedurally Barred by Prior Adjudication at Trial and on Direct Appeal

A. Gray is mindful of the rules of Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243(1969), and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680(1974), cert. den. 419 U.S. 1108, 95 S.Ct. 780(1975).

B. See Argument VIII hereinbelow, specifically pertaining to Gray's Claim IX.

C. With respect to Gray's Claim XII, Gray's death sentence is jurisdictionally faulty and thus subject to habeas corpus review because the Trial Court's sentencing order was defective. The written sentencing order entered by the Trial Court on February 3, 1986, did not make any finding of either vileness or future dangerousness.

The Trial Court apparently relied on findings of "vileness" and "future dangerousness" when it orally

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imposed Gray's death sentence on January 27, 1986, although it did not specifically say as much. (J.A. at 1604-1605). In its written order entered on February 3, 1986, formalizing the sentence, however, the Trial Court apparently abandoned any finding of vileness. In fact, the written order of sentencing failed to base the sentence on any finding of either vileness or future dangerousness. Therefore, there is no basis in the Trial Court's written order upon which to determine what, if any, predicates the Trial Court used in determining the sentence. Thus the sentencing order entered by the Trial Court on February 3, 1986, was on its face inconsistent with the "responsible and reliable exercise of sentencing discretion" required in death penalty cases. Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639(1985).

III. The Trial Court Erred in Dismissing Gray's Claims III, IV, VIII, X, XII, XIV, XVII and XX as Procedurally Barred Because the Claims Could Have Been Raised at Trial and on Appeal, But Were Not.

A. Gray is again mindful of the rules of Brooks v. Peyton, supra, and Slayton v. Parrigan, supra.

B. With respect to Gray's Claim VIII, Gray's death sentence is jurisdictionally faulty because the Trial

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simply prejudged the issues, without hearing any evidence in the form of competent expert testimony, and thereby was in error in denying Gray a plenary hearing.

VII. The Trial Court Erred in Dismissing Gray's Claim XVIII as Meritless, as a Matter of Law.

Counsel declines to elaborate on this question, except to respectfully urge this Court, when engaging in proportionality review, to also compare death sentences in cases under review with life sentences imposed on other capital defendants and with sentences imposed upon noncapital homicide defendants, in light of the facts and circumstances in each case in order to fully insure that capital punishment is meted out only after a truly full proportionability review.

VIII. This Court Should Reexamine Ruling in Gray v. Commonwealth, 223 Va. 313, 356 S.E.2d 157 (1987), at It Relates to Gray's Claim IX and the Sorrell Murders.

Gregg v. Georgia, 425 U.S. 153, 96 S.Ct. 2909(1976), wherein the Supreme Court held it to be "desirable for the jury to have as much information before it as possible when it makes the sentencing decision, "428 U.S. at 204, 96 S.Ct. at 2939, did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case.

In deciding this issue on Gray's direct appeal, Gray v. Commonwealth, supra, this Court relied upon Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422(1985), Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808(1979), cert. den. 445 U.S. 972, 100 S.Ct. 1666(1980), and Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643(1982), cert. den. 460 U.S. 1029, 103 S.Ct. 1280(1983), for support of the use of evidence of other crimes in the penalty phase. Watkins, however, is inapposite, in that Watkins was already charged and indicted for the other offenses referred to. Other cases cited in Watkins involved uncharged crimes which the defendant had admitted committing, or which involved direct evidence that the crimes were committed by the defendant. See Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815(1985), cert. den. 474 U.S. 865, 106 S.Ct. 189(1985), where Poyner himself confessed to other crimes; Stamper, supra, where the victim of another crime by Stamper testified; and Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371(1984), cert. den. 469 U.S. 873, 105 S.Ct. 229(1984), involving eyewitness testimony of another murder.

Only Quintana, supra, stands for the use of evidence of other uncharged crimes to which the defendant had not admitted and which did not involve direct

evidence. In Quintana, witnesses testified as to admissions by the defendant of uncharged crimes in other jurisdictions. These witnesses were not, however, co-defendants of Quintana testifying under plea agreement, as was Tucker in the present case.

In this case, the only direct evidence linking Gray to the Sorrell murders was that of Melvin Tucker, a convicted felon and a co-defendant testifying under a promise of leniency -- testimony which should be considered inherently unreliable. The use of this kind of evidence simply goes beyond the pale established by the existing case law, and in itself was fundamentally unfair and prejudicial to Gray.

The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproven offense which occurred in Chesapeake, by the use of what amounts to no reasonable standard of proof. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense for Gray to such testimony would be either the requirement of proof beyond a reasonable doubt or innocence to be proved. The first

was not achieved and the second would be impossible anyway, and in fact no amount of preparation time on the part of defense counsel would have been adequate. This is where another fundamental violation of Gray's right to due process occurred.

Gray is mindful of this Court's prior ruling in his own direct appeal. Gray, supra. A reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to reexamine its prior ruling accordingly.

CONCLUSION

For the reasons shown, the Trial Court committed reversible error in entering the order dated May 14, 1990, dismissing Gray's Petition for Habeas Corpus, and Gray prays that he be awarded an appeal to this Court.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 94-4009
CASE NO. 94-4011

COLEMAN WAYNE GRAY

Petitioner-Appellee,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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STATEMENT OF PURPOSE

In this death penalty case, the district court held that the Commonwealth had secured Coleman Wayne Gray's death sentence using "tactics violat[ing] the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." On June 28, 1995, a panel of this Court reversed on the ground that this claim is barred by the "new rule doctrine" first announced in Teague v. Lane, 489 U.S. 288 (1989). The panel's opinion conflicts with prior decisions of the Court concerning the "new rule doctrine."

The panel also overlooked a material fact. The crux of Gray's claim is that the Commonwealth unfairly ambushed him by giving insufficient notice that, at the penalty phase of his capital murder trial, Gray would be tried for an unrelated grisly double homicide, and that the Commonwealth failed to disclose that it possessed evidence tending to prove that another individual, Timothy Sorrell, had committed these murders. The panel's opinion considers this fact only in passing, describing Sorrell as merely "an initial suspect," even though Gray demonstrated at a federal evidentiary hearing that Sorrell was a suspect right up until the time of Gray's trial. Because it ignored this material fact, the panel also failed to determine whether the Commonwealth had an independent duty to disclose this evidence because it was exculpatory in nature.

Gray also makes a suggestion for rehearing in banc because consideration by the full court is necessary to secure uniformity of its decisions concerning the new rule doctrine. Moreover, this proceeding involves a question of exceptional importance because it concerns whether states within the Fourth Circuit may present evidence of prior unadjudicated conduct at the penalty phase of capital murder trials without any regard whatsoever for the reliability of the evidence, and without any concern for whether defense counsel has been given a reasonable opportunity to challenge the evidence.

STATEMENT OF FACTS

Richard McClelland, the manager of a Murphy's Mart store in Portsmouth, Virginia, was abducted from his car after leaving work, robbed, and shot to death in Suffolk, Virginia. Melvin Tucker and Coleman Gray were charged with this offense. Judge Godwin, the Suffolk Senior Circuit Court Judge, appointed James Moore and Ward Eason in May, 1985, to represent Gray.

Trial counsel twice moved the court either to pay for or to appoint an investigator to help them fully and adequately prepare Gray's defense. (A. 798-800, 1063-68). Those motions were denied. Id. Trial counsel also moved for disclosure of all exculpatory evidence. (A. 790-92). Pursuant to the order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station and allowed them to examine all of the physical evidence collected concerning the McClelland murder. (A. 937). Ferguson produced no exculpatory evidence related to the penalty phase of Gray's trial.

Under Virginia law, only the triggerman may be convicted of capital murder and sentenced to death. Va. Code §18.2-18. Consequently, the most critical factual issue in the McClelland murder trial probably was the identity of the triggerman. There was no physical evidence to prove whether Tucker or Gray shot and killed McClelland, and each man claimed that the other had committed the murder. (A. 937). Before Gray's trial, however, the Commonwealth's Attorney entered into a plea bargain with Tucker. In exchange for Tucker's testimony against Gray for capital murder, the Commonwealth agreed to prosecute Tucker only for first degree murder. (A. 937-38).

Gray's trial began on December 2, 1985. Besides the testimony of Tucker, the Commonwealth offered only the testimony of three jailhouse snitches to prove that Gray was the triggerman. On December 5, 1985, Gray's jury retired to deliberate, after receiving all of the evidence concerning the McClelland murder, and after being instructed by the trial judge. That same

day, the jury returned verdicts of guilty against Gray on all counts. (A. 940).

At the beginning of the trial, one of Gray's attorneys asked the court to order the Commonwealth's Attorney to reveal the evidence he would introduce at the penalty phase if Gray was found guilty. Ferguson represented to the court and to defense counsel that he intended to introduce evidence of statements Gray allegedly had made about other crimes he had committed, including the murders of Lisa and Shanta Sorrell. When pressed by defense counsel concerning whether he planned to present "evidence or just his statement," Ferguson pledged to introduce only "[s]tatements made by your client that he did these things." (A. 938-39). Ferguson did not disclose the context of the statements or to whom Gray allegedly had made these statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia, area. In December, 1984, Lisa Sorrell and her three-year-old daughter Shanta were abducted from Greenbriar Mall in Chesapeake, Virginia. Their abandoned bodies were found five days later, after an intensive, well-publicized search. Lisa Sorrell was slumped in the passenger seat of her partially burned automobile. She had been shot in the head six times by a .32 caliber gun. Shanta's body was found in the trunk of her mother's car. She apparently had died of carbon monoxide inhalation. (A. 939-40).

On the morning after the jury returned its conviction, the penalty phase of Gray's capital murder trial began. Before the penalty trial began, the attorneys met in the judge's chambers. Gray's counsel told the court that the previous evening, Ferguson had disclosed for the first time that he intended to introduce not only statements Gray allegedly had made about the Sorrell murders, but also substantial testimony and graphic evidence about the crimes. Despite Ferguson's previous unequivocal pledge to introduce only Gray's alleged statements, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) testimony of Detective Slezak, the police

officer who investigated the Sorrell murders;[1] 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) testimony of the medical examiner who investigated the cause of death and the nature and extent of the Sorrells' injuries. (A. 940-41).

Gray's trial counsel repeatedly told the court that they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut the statements allegedly made by Gray to fellow inmates. Despite counsel's plea for additional time to prepare, the trial court permitted Ferguson to introduce extensive evidence about the Sorrell murders. (A. 2063-68). First, the Commonwealth again called Gray's accomplice Melvin Tucker to testify. Tucker testified that in May, 1985, while he and Gray were looking for newspaper articles about the McClelland murder, Gray pointed to an article with a picture of the Sorrells and admitted that he had "knocked off" Lisa Sorrell.[2] (A. 941).

Based solely upon Tucker's testimony, the trial court allowed Commonwealth's Attorney Ferguson to introduce all of the evidence gathered by the Chesapeake Police Department regarding the Sorrell murders. First, the Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders. The ostensible purpose of Slezak's testimony was to demonstrate that the Sorrell murders actually had occurred, and he did this by identifying various graphic photographs of the burned automobile and the murder victims. These photographs were admitted into evidence. (A. 941). Next, Dr. Faruk Presswalla, the state medical examiner

[1]It is clear that the prosecutor lied when he promised to introduce statements only. Slezak testified at the federal evidentiary hearing that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. (A. 940).

[2]The Sorrell murders occurred nearly six months before the McClelland murder. No such newspaper article, from the time of the McClelland crime, with pictures of the Sorrells, has ever been introduced into evidence. (A. 941).

who performed the Sorrell autopsies, testified concerning the victims' causes of death. Presswalla displayed the autopsy photos of Lisa and Shanta Sorrell to the jury, and he described the violent causes of their deaths. (A. 2136-44).

As they had predicted to the trial court, Gray's trial attorneys were unable to effectively cross-examine these witnesses. Trial counsel were prepared only to challenge the evidence Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the Sorrell murders. (A. 944).

After the Commonwealth rested, Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, Gray denied being the triggerman, and he blamed the killing on Tucker. He also flatly denied any involvement in the Sorrell murders. (A. 944).

During penalty phase closing arguments, Ferguson used the Sorrell evidence extensively in his efforts to convince the jury to sentence Gray to death as a future danger to society. Ferguson described Shanta Sorrell's horrible death to the jury, he charged Gray with committing "murder after murder," supporting this statement with the Sorrell killings and a California crime for which Gray had been acquitted, and he accused Gray of "sit[ting] in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun." (A. 2243-45, 2250-52, 2263). After deliberating for one hour and ten minutes, the jury unanimously fixed Gray's punishment at death. The jury found both that Gray posed a future danger to society and that his conduct in committing the offense was vile "in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (A. 2265-68).

Following state post-conviction proceedings, the federal district court convened an evidentiary hearing on Gray's federal habeas corpus petition. In this petition, Gray claimed that the

Commonwealth's use of the Sorrell evidence violated his due process rights. The stated purpose of the evidentiary hearing was to determine whether Gray's attorneys were given ample notice of the evidence to be presented against him concerning the Sorrell murders, whether he was given a fair opportunity for cross-examination concerning the Sorrell murder issues, and whether the prosecution failed to turn over exculpatory information tending to prove that another person killed Lisa and Shanta Sorrell. (A. 265).

During the hearing, Gray proved that if his defense attorneys had possessed the evidence concerning Timothy Sorrell (either in response to their Brady motion or through diligent investigation after adequate notice), they could have challenged the truth of Tucker's testimony through effective cross-examination of Detective Slezak. Specifically, defense counsel could have made at least the following points during Slezak's testimony: 1) Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time. 2) The police designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed. 3) Timothy Sorrell admitted being at the Greenbriar Mall on the evening of the murders. 4) When Timothy Sorrell ran into his wife's parents at the mall that evening, he ignored them. 5) Timothy Sorrell made suspicious comments after he was notified by the police that his wife and child had been found. 6) Timothy Sorrell changed his alibi throughout the murder investigation. 7) Timothy Sorrell had a strong motive to commit these murders--just two weeks prior to the brutal slayings, he became the beneficiary of an insurance policy written on his wife's life. 8) Six days before Coleman Gray's trial, Lisa Sorrell's parents filed a lawsuit seeking to prohibit Timothy Sorrell from collecting the proceeds of the life insurance policy. 9) Timothy Sorrell visited a friend on the night his wife and child disappeared. That evening, five days before their bodies were found, Sorrell allegedly told his friends that his wife and baby were dead. 10) Contrary to Detective Slezak's speculation, Coleman

Gray did not have sufficient time to commit the Sorrell murders during his wife's dinner break. 11) Even when Slezak lied to Coleman Gray and told him that his fingerprint had been found at the Sorrell murder scene, Gray steadfastly maintained his innocence. 12) Slezak had consulted with the Chesapeake Commonwealth's Attorney to determine whether it was appropriate to prosecute Timothy Sorrell.

This list is derived from the federal district court's findings of fact. To date, no one ever has been charged with or tried for the Sorrell murders.

ARGUMENT

I. THIS COURT'S PRIOR DECISIONS DEMONSTRATE THAT GRAY DOES NOT SEEK TO CREATE A NEW RULE, BUT INSTEAD MERELY SEEKS TO APPLY FUNDAMENTAL, PRE-EXISTING PRINCIPLES OF DUE PROCESS TO THE FACTS OF HIS CASE

In its memorandum opinion granting relief, the district court concluded that Gray's right to due process was violated by the manner in which the Commonwealth presented evidence of the Sorrell murders to the jury. The court relied chiefly upon two intersecting principles of due process articulated in Gardner v. Florida, 430 U.S. 349 (1977). First, a capital defendant may not constitutionally be sentenced to death based in part upon evidence which he has had no opportunity to explain or deny. Id. at 362. Second, counsel for a capital defendant must be given a fair opportunity to challenge the accuracy or materiality of the evidence presented by the prosecution. Id. at 356. Without these safeguards, a state creates the risk that a person will be sentenced to death based on constitutionally unreliable evidence. Id. at 359. The Gardner court made clear that these principles of due process apply to a wide range of circumstances. While a defendant in the penalty phase of a capital murder trial may have no right to object to a particular result of the sentencing process, he does have a legitimate interest in the character of the procedure which leads to the imposition of his sentence. Id. at 358. Thus, the due process principles established in Gardner are

meant to apply not only to cases that are similar factually, but to a variety of situations involving the character of the penalty phase procedure used by a state to obtain a death sentence.

In this case, Commonwealth's Attorney Ferguson presented Coleman Gray as probably guilty of the Sorrell murders when in fact he probably is innocent. First, Ferguson lied to defense counsel and promised only to introduce statements made by Gray to others about the Sorrell murders, even though Ferguson knew he intended to present much more. Ferguson then conducted a full-blown prosecution of the Sorrell matter, including graphic testimony and gruesome photographs from the Sorrell crime scene and autopsies. He also withheld from defense counsel exculpatory evidence that Timothy Sorrell, the husband and father of the victims, may have committed the murders. Under these circumstances, the district court concluded that trial counsel was not given a fair opportunity to challenge the accuracy and materiality of the evidence presented by the prosecution, and that Gray had been sentenced to death based in part upon evidence which he had been given no opportunity to explain or deny.

A panel of this Court, however, held that the district court failed to conduct "new rule" analysis. According to the panel decision, "the precise rule petitioner seeks is a constitutional entitlement to adequate advance notice of particular items of evidence." Slip op. at 8 (emphasis in original). The panel concluded that this specific rule (which was neither advanced by Gray nor established by the district court) is not dictated by Gardner. The panel's decision is in direct conflict with at least two other opinions from this Court.

In Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), this Court explained that, for purposes of new rule analysis, the rule sought by the petitioner rarely is defined properly as "the most specific conclusion or holding [the petitioner] hopes we reach." Id. at 883 (emphasis in original). This is so especially when a case provides a standard that necessarily will be applied to widely varying fact

patterns. For example:

> Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the Jackson v. Virginia test to a "new" set of facts in evidence.

35 F.3d at 885 (quoting West v. Wright, 931 F.2d 262, 266. (4th Cir. 1991), rev'd on other grounds, 112 S. Ct. 2482 (1992)). Indeed, the Turner decision also cites with approval the Ninth Circuit's holding in Paradis v. Arave, 20 F.3d 950, 953-54 (9th Cir. 1994), that the new rule doctrine does not bar application of Gardner's due process principles to a new set of facts. 35 F.3d at 885 n.11.

The Turner court summarized its holding as follows:

> [W]hen we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of Teague. ... [W]hen a rule provides a standard that of necessity requires a case-by-case examination, generally the results yielded by that application are not "new rules" because those results do not "break[ ] new ground or impose[ ] a new obligation on the States or the Federal Government."

Id. at 885-6 (quoting Teague, 489 U.S. at 301).

In Ostrander v. Green, 46 F.3d 347, 354 (4th Cir. 1995), this Court warned about the dangers of framing "rules" too narrowly when conducting new rule analysis. The Green opinion recognized that, if courts choose to characterize the "rule" as the most specific conclusion or holding ostensibly sought by a petitioner, states then can erect a Teague bar in almost every case. Id. The upshot of this effectively would be to abolish federal habeas review, which certainly is not the intent of Teague and its progeny. See Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring in the judgment) ("In Teague, we refused to give state prisoners the retroactive benefit of rules of law, but we did not create any deferential standard of review with regard to old rules."). Justice O'Connor is the author of the Teague opinion.

Other decisions of the United States Supreme Court demonstrate that the application of

Gardner's principles to new sets of facts typically do not create new rules. For example, in Simmons v. South Carolina, 114 S. Ct. 2187 (1994), the Court held that when a state seeks the death penalty based on future dangerousness, the defendant cannot be denied the right to inform the jury that he would be ineligible for parole if sentenced to life imprisonment. The Court explained that its decision was compelled by Gardner's holding that a state may not send a man to his death "on the basis of information which he had no opportunity to deny or explain." Id. at 2194. And, in Crane v. Kentucky, 106 S. Ct. 2142 (1986), a unanimous Court held that a state may not exclude testimony about the circumstances of a defendant's confession on the ground that the testimony pertains solely to an issue of voluntariness resolved against him in a pre-trial ruling. The Court noted that:

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

Id. at 2146-47 (emphasis added and citations omitted).

Here, Gray did not seek the narrow rule described by the panel in its decision, that he was constitutionally entitled to adequate advance notice of particular items of evidence.[3] Nor did the

[3]In its opinion, the panel suggests that the United States Supreme Court's holding in Williams v. New York, 337 U.S. 241 (1949), may have dictated dismissal of Gray's claim on the merits. The panel's decision ignores that Gardner implicitly overruled the holding in Williams as it may have related to capital cases, both because the Williams case was decided in 1949, when no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by the Court, and because it was decided before it was "clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 357-58.

The Court's implicit overruling of Williams for capital cases also casts doubt on the panel's decision to rely on a non-capital case, Weatherford v. Bursey, 429 U.S. 445 (1977), and its progeny as other precedent dictating a decision on the merits against Gray. The cases cited by the panel are not death penalty cases applying due process principles to the unique capital sentencing process. Moreover, even these rulings recognize exceptions to their holdings for factors present in this case.

district court impose this obligation upon the Commonwealth of Virginia. The district court simply applied the principles set forth in Gardner to hold that the Commonwealth's Attorney's "tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution." The district court's decision stands for the unremarkable proposition that, when the Commonwealth chooses to introduce evidence of prior unadjudicated conduct in seeking a death sentence, its behavior must comport with basic principles of due process, including those described in Gardner. This is all that Gray asked for, and it is all that the district court did.

As Judge Hall noted in his opinion concurring in the panel's decision, the majority's opinion, insofar as it is contrary to Turner and Ostrander, will present difficulties for the district courts in the Fourth Circuit. The panel's decision simply cannot be squared with the framework for "new rule" analysis painstakingly distilled from the United States Supreme Court's precedents by the Turner panel. Consequently, the Court should grant Gray's petition for rehearing and his suggestion for rehearing in banc, to address this conflict and to secure uniformity of this Court's decisions concerning the new rule doctrine.

II. THE COURT'S OPINION OVERLOOKS THE FACT THAT TIMOTHY SORRELL WAS NOT MERELY AN "INITIAL SUSPECT," THAT THE COMMONWEALTH POSSESSED MORE EVIDENCE TENDING TO PROVE THAT SORRELL COMMITTED THE MURDERS THAN THAT GRAY DID, AND THAT THE FAILURE TO DISCLOSE HIS IDENTITY TO COUNSEL VIOLATED BRADY

Recently, the United States Supreme Court explained in Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995), that one proves a Brady violation by "showing that the favorable [withheld] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence

See, e.g., Weatherford, 429 U.S. at 559-60 (concealment of exculpatory evidence and deliberate misrepresentation); United States v. Kendall, 766 F.2d 1426, 1441 (10th Cir. 1985) (unfair surprise).

in the verdict." Here, the Commonwealth possessed abundant evidence tending to prove that Timothy Sorrell murdered his wife and child. Nevertheless, the panel's decision pays scant attention to this evidence, noting only that Sorrell was an "initial suspect" in the murders, "although upon further investigation he was not charged." Slip op. at 6 and 12 n.3. The facts presented to the district court demonstrate that Sorrell was much more than a mere initial suspect. Indeed, there was enough evidence against Sorrell to prompt Detective Slezak, the lead investigator, to consult the Chesapeake Commonwealth's Attorney and ask him to determine whether it was appropriate to prosecute Timothy Sorrell. (A. 943).

Under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), Gray had the right to discover any exculpatory evidence held by the Commonwealth relating either to guilt or to punishment. Gray was entitled to the Sorrell evidence withheld by the Commonwealth, especially after making a specific request for exculpatory evidence, because it was "favorable to [the] accused ... and material to ... punishment." Brady, 373 U.S. at 87. It could not have been more material -- it tended to prove that Gray did not commit the Sorrell murders, even though the Commonwealth sought to portray him as guilty of those crimes.

The panel's faulty "new rule" analysis is driven in part by its failure to recognize that Sorrell was a serious suspect, and that Gray was entitled to exculpatory evidence related to Sorrell, or at a minimum to sufficient time to develop that evidence and use it at the penalty phase. In large part because it read Timothy Sorrell out of the equation, the panel was able to distill the "rule" sought by Gray as an entitlement to adequate advance notice of particular items of evidence, even though Gray never requested such a rule. It also allowed the panel to hold that Gardner's general rule forbidding a capital defendant to be sentenced "on the basis of information that he had no opportunity to explain or deny" was inapplicable simply because Gray's attorneys were given an opportunity to cross-

examine Melvin Tucker, Detective Slezak, and the medical examiner.

The opportunity to cross-examine has never been a constitutionally adequate substitute for access to exculpatory information when the defendant has no reason to know that the exculpatory information exists. See, e.g., Love v. Johnson, No 92-7080, 1995 WL 369609, (4th Cir. June 22, 1995) (describing more lenient standard for Brady requests when defendant has no reason to know whether exculpatory information exists). Defense counsel, who reasonably relied on the prosecutor's promise that evidence of the Sorrell murders would be limited to Gray's alleged statements to others, had no reason to expect more than a credibility contest regarding these statements.

Even if the prosecutor's disclosure that he would introduce the subject of the Sorrell murders should have put defense counsel on notice that everything relating to that murder was fair game, and even if the exculpatory information known to the Commonwealth all could have been discovered by defense counsel -- dubious propositions at best -- defense counsel could not possibly investigate and develop this information in the three days between disclosure and the start of the penalty trial, while defending Gray for the capital murder of McClelland. As soon as the prosecutor dropped his "time bomb" at the start of the penalty trial, defense counsel promptly and repeatedly informed the court that they needed more time. The district court made an express factual finding that counsel made a satisfactory request for a continuance. The panel, in contravention of Anderson v. City of Bessemer City, 470 U.S. 564 (1985), ignored this factual finding and concluded not only that Gray received adequate notice to discover the exculpatory evidence, but also that Gray's counsel did not ask for additional time.

Because of the prosecutor's unethical and unconstitutional conduct, defense counsel was denied a meaningful opportunity to rebut the evidence and innuendo that Gray was involved in the Sorrell killings. The Commonwealth chose to play unfairly, to ambush Gray by lying about what it

intended to produce at the penalty phase and by failing to disclose evidence tending to prove that Gray did not commit these crimes. Because the panel ignored the substantial evidence withheld by the prosecutor, however, it also failed to recognize that Gray was denied the opportunity to present a defense that would have "put the whole case in [ ] a different light." Kyles, 115 S. Ct. at 1566.

CONCLUSION

One of the most difficult challenges presently facing federal habeas courts is application of the sometimes perplexing new rule doctrine. In Turner, the Fourth Circuit gave the district courts a practical roadmap for new rule analysis, distilled from the United States Supreme Court's precedents. The panel's decision here conflicts with the Turner analysis, leaving the district courts without direction. Rehearing should be granted to resolve this conflict, and to give consideration to the Sorrell evidence withheld by the prosecutor. Rehearing in banc should be granted to secure uniformity of the court's new rule decisions.

Rehearing in banc also is appropriate because the issue presented is one of exceptional importance, concerning whether states may present evidence of prior unadjudicated conduct at the penalty phase of capital murder trials without regard for the reliability of the evidence, and without concern for whether defense counsel has been given a reasonable opportunity to challenge the evidence. Without further consideration by this Court, states will remain free to mimic the tactics used by the prosecutor here to secure Gray's death sentence.

Respectfully submitted,

COLEMAN WAYNE GRAY

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 1995, a copy of the foregoing Petition For Rehearing and Suggestion For Rehearing In Banc was hand delivered to John H. McLees, Jr., Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, counsel for Respondent-Appellant.

Paul G. Turner

December 1, 1995

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SUPREME COURT, U.S.

William Suter
Clerk of the Court
Clerk's Office
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

RE: Coleman Wayne Gray v. J.D. Netherland
Case No. 95-6510

Dear Mr. Suter:

Enclosed for filing please find the original of the Reply Brief of the Petitioner, as well as a Certificate of Service. The brief already has been faxed to the Court for distribution.

Thank you for your assistance in this matter.

Sincerely,

Donald R. Lee, Jr.

DRL/spb

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No. 95-6510

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

COLEMAN WAYNE GRAY

Petitioner

versus

J.D. NETHERLAND, WARDEN

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, Paul G. Turner, a member of the Bar of this court, do hereby certify that three copies of the foregoing Reply Brief for Petitioner were hand-delivered to John McLees, Esq., Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219 on this the 1st day of December, 1995.

Paul G. Turner

(6)

No. 95-6510

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J.D. NETHERLAND, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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December 2, 1985:	Guilt phase of trial.
December 6, 1985:	Sentencing phase of trial. Petitioner sentenced to death.
January 13, 1987:	Brief of Appellee filed in the Supreme Court of Virginia.
April 24, 1987:	Convictions and death sentence affirmed by the Supreme Court of Virginia, Gray v. Commonwealth.
July 7, 1988:	Petition for writ of habeas corpus filed in the Circuit Court for the City of Suffolk, Virginia.
August 22, 1989:	Hearing on respondent's motion to dismiss petition for writ of habeas corpus.
May 23, 1990:	Petition for writ of habeas corpus denied by order of the Circuit Court of the City of Suffolk, Virginia.
August 14, 1990:	Petition for Appeal from denial of state habeas petition filed in the Supreme Court of Virginia.
January 11, 1991:	Petition for Appeal denied by order of the Supreme Court of Virginia.

In the Circuit Court for the City of Suffolk, Virginia

Coleman Wayne Gray

v.

Commonwealth

Q Tell the jury if you would, in your own words, what this letter from Mr. Ferguson to your lawyer, Andrew Sacks, means to you. What does this mean to you, without trying to explain in details?

MR. FERGUSON: Your Honor, I think the letter is self-explanatory. The letter says exactly what it says. It's very clear. I think the jury itself can read the letter. I have even read the letter to the jury, and it says exactly what it says.

THE COURT: He can tell what he thinks it says. He can tell what he thinks it means. Go ahead.

MR. FERGUSON: All right, sir.

MR. MOORE, Continuing-

Q Okay.

A It means no more to me than what it says.

Q What does it say?

A It says, indicates to me that they want me to tell the truth about the situation. That's the way I take it.

Q And in exchange for you telling the truth what else does it mean to you?

A Well, regardless of what the exchange is to me, if it came down to it this is what was going to be said anyway.

Q What does it mean as far as possible punishment?

A I know what the punishment is. The letter don't have to tell me that.

Q You mean you don't know that in exchange for your testimony here today you will not be electrocuted?

A I wasn't planning on being electrocuted for to start with.

MR. FERGUSON: The letter is clear. The man will be tried on a first degree murder char , [sic] which does not carry a death penalty offense.

MR. MOORE: Your Honor, I have asked him that question. He said he doesn't even know it. I think I can explore that.

MR. FERGUSON: I assume Mr. Tucker is not a lawyer.

MR. MOORE: Well, I'll ask it again.

THE COURT: He's on cross examination. It's his agreement. He can explain what he thinks it means.

MR. MOORE: All right

MR. MOORE, Continuing-

Q It means one thing to you. It means that you are going to come forward and tell the truth today; is that right?

A Yes, sir.

Q Now, you have made other statements to police officers, haven't you, on prior occasions; is that correct?

A Yes, sir.

Q That's not the same thing, what you're telling today, as what you have told the police in the past; is it?

A No, sir.

Q So today you're going to come forward and tell the truth; right?

A Yes, sir. The first time I talked to the police I didn't indicate myself like it really was.

Q Well, okay. So you haven't told the truth in the past to the police about this, but today you're going to do so. In exchange for the truth today, what does it mean you're going to get in return? Do you understand this to mean there is a guarantee that you will not be prosecuted for capital murder? you understand that?

A Yes, sir. For capital murder?

Q Yes, sir.

A Yes, sir.

Q And what does capital murder mean as the difference between first degree murder? What's the difference between those two things?

A Capital murder carries the electric chair and murder doesn't.

Q And you are not going to be charged with capital murder; are you? You have got that promise from this man, don't you?

A I suspect so.

Q In exchange for your testimony today; right?

A Yes, sir.

Q What is your understanding as discussed by Mr. Ferguson and your lawyer as to the maximum punishment that you can get for your testifying and your participation in this trial?

A Any number of years.

Q A number of years?

A Any number of years.

Q Not even a life term?

A That's if I plead guilty. If I plead not guilty –

Q If you plead –

A – If I plead guilty I cannot get life.

Q If you plead guilty you cannot even get a life term for your participation in this crime?

A Yes, sir.

Q What happens if you plead not guilty and elect a trial? What is the maximum punishment you can get for your participation in this crime?

A Any number of years.

Q A number of years?

A Yes, sir.

Q So to sum it up, if you would – What does this really mean to you right now, in relation to your family and five children? It means you get to live; doesn't it?

MRS. TUCKER: I don't think my children should be brought up in a courtroom.

THE COURT: All right.

MR. MOORE: I ask that she be removed from the courtroom.

THE COURT: Any further outbursts and you will be removed from the courtroom. All right, go ahead.

MR. MOORE, Continuing-

Q You testified earlier that you had been charged or convicted of a felony; is that correct?

A Yes, sir.

Q I think you said it was what?

A Armed robbery.

Q Robbery with the use of a firearm; is that correct?

A Yes, sir.

Q Mr. Tucker how far is your place of work, where you work, from where this man was killed? How far?

A Not far.

Q How far?

A I don't know. I never walked it off, measured it.

Q Few hundred feet? Hundred yards?

A Maybe.

Q Not even a mile; is it?

A No, it's not a mile.

Q You said you made statements to the police officers before, but that wasn't the truth; was it?

A That's what I said.

Q You said it was not the truth? Speak up so the jury can hear you.

A Yes, sir.

Q It was not the truth when you talked to the police officers before; right?

A Most of it was.

Q Most of it was?

A Yes, sir.

Q Let's see what was not the truth, "Little Man". The first statement, do you remember giving a statement to the police with Carl Lilley, Sergeant Carl Lilley present on May 22, 1985? Do you remember that statement?

A I gave him a statement. I don't recall the date.

Q Remember making that? You made your initial statement at 1:40 in the morning; is that right?

A I made a statement. I don't know what time it was.

Q To Sergeant Lilley, 1:40 in the morning approximately, the best you can remember?

A I made a statement to Sergeant Lilley.

MR. FERGUSON: Your Honor, I would ask if Mr. Moore can either question the witness back here. I can't see him. I can't hear him. I can't do anything when he's standing right in front of the witness.

MR. MOORE: I'll stand where Mr. Ferguson can hear me. Your Honor.

MR. FERGUSON: That's fine.

MR. MOORE, Continuing-

Q Do you remember making a statement at 7 o'clock in the morning on May 22, the same time you made one earlier in the morning? Did you make one at 7 o'clock in the morning?

A I guess it was. I made one in the morning.

Q Did you make another statement 2 o'clock in the afternoon the same day?

A I made several statements. I don't recall what day or what time I made the statement.

Q Did you tell the truth in any of those three statements?

A Yes. I told most of the truth in all the statements.

Q But you told most of the truth. In fact, as the statement went on isn't it true that you told a little bit more of the truth every time you talked?

A I don't remember what was said in each statement.

Q Okay. We're going to go through that a little bit, sir. Let's see what you testified to today. You said that you had known Mr. Gray for a couple of months you testified; is that correct?

A Several months.

Q Several months before the commission of this crime?

A Yes, sir.

Q How many months?

A I don't know how many.

Q One, two, three, four, fifteen, or twenty? How many? A guess?

A I don't know how many months. I know'd him several months.

Q Did you know him at Christmas time?

A No, sir.

Q Didn't know him at Christmas time. And so you were over there while they were making these plans. Now, you say you really didn't know what was going on at that time; right?

A The sketching of the store was drawed out before I came out.

Q The sketch?

A The store had been discussed before I came over.

Q And when you came over why do you think they told you?

A I don't know why they told me.

Q Oh. Didn't they ask you to participate in the crime?

A Yes, I suspect so.

Q And you agreed at that time to participate in the crime; didn't you?

A Maybe I did.

Q And in exchange for your participation you were to receive one half of the –

A No, sir.

Q – take?

A No, sir.

Q And further, the next thing that you were over with Coleman at somebody's house getting high on a free base bowl; was that your testimony?

A Yes, sir.

Q Were you getting high on a free base bowl?

A Yes, sir.

Q How high were you?

A About as high as cocaine can get you.

Q You were pretty smoked, weren't you?

A No, sir.

Q Well, how many hits had you had or how much had you had?

A I don't know.

Q Was Coleman high on it as well?

A Everybody smoked out of it was high I suspect.

Q What kind of affect did it have on you that night? Were you thinking clearly or what?

A Yes, sir.

Q I have never used cocaine myself, but is your recollection clear after your use of cocaine.

A I suppose to. I guess so.

Q Well, is it or is it not clear after you use cocaine?

A I don't know. Maybe it have a differ affect on some people.

Q What kind of affect does it have on you?

A Just a speeding high to me.

Q Speed high? Next day you remember everything perfectly; is that right?

A Yes, sir.

Q How often do you get high on cocaine?

A I get high off cocaine a lot.

Q As much as you can; can't you?

A Not as much as I can.

Q In fact, you've been getting high since you've been in jail; haven't you?

A No, sir.

Q Haven't you been charged with an offense of –

MR. FERGUSON: Your Honor, I am going to object. I don't see any relevancy to this at all. The man's admitted he used cocaine, he has admitted to a lot of things. That's got nothing to do with trying this case. I think that what's relevant in this case is what he did on this occasion and during this period of time.

MR. MOORE: Your Honor, our position is the credibility of this man can put him in the electric chair and take him out. I'm entitled to know the extent and use of a drug as serious as cocaine. I think I should be able to explore as fully as possible and the jury should know exactly how serious a drug addict this man is. And the fact that he was smoking it in jail is certainly one of them.

THE COURT: Well, the fact he's a user is one thing, Mr. Moore. I assume that there has been no conviction of that?

MR. MOORE: No, sir. I could ask him if he has been charged with that or if he actually did it.

THE COURT: Well, I don't think we can go into the, into the charge or into the – if there has been no conviction.

MR. MOORE: May I ask him if he's used drugs while he's been in jail?

THE COURT: Sure.

MR. MOORE, Continuing-

Q Have you got high on cocaine or any drugs since you have been incarcerated?

A I haven't got high on cocaine.

Q Have you gotten high on other drugs since you have been incarcerated?

A Yes, sir.

Q Are you high today?

A No, sir.

So you were high that night and you ended up at Murphy's Mart which, as I understand your testimony, was no idea of yours at all, right? It was Coleman Gray's idea to pull in there and you pulled into Murphy's Mart with him?

A I didn't say it was anybody idea.

* * *

In the Circuit Court for the City of Suffolk, Virginia

[Caption Omitted In Printing]

Testimony of Ronald H. Whitte

[746] MR. RONALD H. WHITTE, having been first duly sworn was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A Ronald H. Whitte.

Q And Mr. Whitte, where do you live?

A Portsmouth, Virginia.

Q And where are you employed?

A Smithfield Foods.

Q And what is your position with them?

[747] A I'm an engineer.

Q Are you married?

A No, I'm not.

Q All right. Mr. Whitte, I want to take your attention back to 1977, back in June, the first part of July, 1977. Did you have occasion to come into contact with the defendant, Coleman Wayne Gray?

A Yes, sir; I did.

Q What were the circumstances under which you came into contact with him?

A Coleman Gray –

Q Speak up a little bit so all the jurors can hear.

A Coleman Gray attempted a robbery and I was wounded in the process.

Q All right. Tell us, if you would, factually the details of what you were doing and exactly what occurred?

A It happened July, '77. I remember that because my boy was born that year.

Q Your what?

A My baby boy was born then.

Q I see.

A I came home from work and my wife and I at the time wanted to go for a bike ride. So, we put our children on the back of the bikes.

Q How many children did you have [748] that you put on?

A I have a little girl who was almost three at the time and a boy that was six months old.

Q All right.

A There was a housing development. Well, there were two housing developments, and in between those two housing developments was a wooded area. And it was a bike path. There were two bike paths, one about 18,

24 inches higher than the other path with some shrubbery in between and a few trees.

We had gone through the one housing development and had entered the woods when two black men, one of which was Coleman Gray, asked which way Churchland was.

Well, without stopping the bike – I thought he meant the shopping center, and we kept riding on the lower path. He was on the higher path.

Q Was he on foot or on a bike?

A Sir?

Q Was he on foot or on a bike?

A He was on foot.

Q All right.

A I told him to keep going straight out of the woods, he'll come to the shopping center. The next thing I know is he's running along side of me on the upper path, a gun pointed at me, saying, "Stop, or I'll blow your M.F.-ing head off."

Q Say the words, exactly what he [749] said.

A Mother fucking head off. Of course, at that time I was frightened. I got off the bike. I was afraid for my family. I walked away from them, further down the path to get away from them. And at that point Gray pointed the gun at me, saying, "Give me your money." I told him, "No." He shot me in the arm.

At that point my fear turned to anger and I went after him. I chased him. He fired several more rounds,

one of which hit me in the foot. At that point I couldn't catch him. I went back to the bike.

The other black man was standing, as I was looking at Gray in front of me, the other man was on the lower trail behind my wife and the babies on the bike. Again, I could not identify him. My concentration was on Gray. I went back to the bike, were leaving the bikes or leaving the woods. Just before we get out of the woods – and I guess this is the part that really gets to me – he fires another shot that goes past us through the trees, and that's the one that could have hit one of my babies. And shooting at me is one thing, but when he took a shot and could have hit one of those kids, that really got to me.

We got out of the woods, and shortly after that Coleman Gray was found guilty of I guess assault and attempted robbery.

Q You were actually struck in two [750] locations?

A Yes, sir.

Q And they were what part of your body?

A My forearm and my left foot.

Q All right. How many shots in all were fired at you or in your direction?

A My wife said she heard –

Q How many did you hear? I would rather – Don't go into what your wife said.

A It was several. The one, you know, I didn't even hear the one that hit me. That was just an impulse. Three that I recall. The third one, of course, hit my foot.

Q How close did that last bullet come to striking you or some member of your family?

A Well, that's – I could still hear that bullet going through the trees. How close do you have to be? Pretty darned close.

Q All right. Now, when you refer to Coleman Wayne Gray, the person that committed these acts, do you see that man in the courtroom?

A Yes, sir; I do.

Q Would you identify him for the members of the jury?

A The man in the black suit.

Q The defendant in this case?

A Yes, sir.

A Yes, sir.

Testimony of Melvin Tucker

[770] MELVIN G. TUCKER, having been first duly sworn, was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court, please, and when you do speak up so all [771] the members of the jury can hear you. It's difficult to hear in here.

A Melvin Tucker.

Q And Mr. Tucker, you have previously testified in this case; is that correct?

A Yes, sir.

Q And you realize you're still under oath in these proceedings?

A Yes, sir.

Q All right. And I previously questioned you regarding your prior criminal record and we have gone into all the details of the plea agreement, or the agreement that was entered into between your attorney, yourself, and the Commonwealth Attorney's Office; is that correct?

A Yes, sir.

Q So, all of the things you earlier testified to regarding those things are still in force and effect; is that correct?

A Yes, sir.

Q All right. Now Mr. Tucker, I want to take your attention back to sometime prior to this incident and ask if you had occasion to be in the company of the defendant, Coleman Wayne Gray, as it related to some other criminal offenses? Conversations you had?

A Yes, sir.

Q All right. What was the first [772] offense that you talked with him about?

A Well, one night I was over – I was laying down asleep and he came over to the house and knocked on the door. My wife answered the door, and she came to woke me up, and I talked with him. He told me that he had took the Circle Restaurant off.

Q Speak up loud so the members of the jury – He did what?

A He came over and told me that he had took the Circle Restaurant off.

Q Took it off?

A Yes, sir.

Q All right. What happened after that? What did he say after he told you that? What did you do?

A He asked me come over to his apartment. I got up and went over to his apartment, and he had the money on the table.

Q How much money did he have?

A I was about a thousand dollars.

Q And when you saw that what conversation did you then have with him?

A He told me what he had did with the people.

Q What did he tell you he had done with the people?

A Locked them in the freezer.

Q And, what did he – What did you say [773] when he told you he had locked them in the freezer?

A I asked him was it cold in the freezer. He said yeah. I told him I was going to call the police, let them out.

Q Did you call the police?

A Yes.

Q Did you leave your name or called anonymously?

A Called anonymously.

Q All right. Now, subsequent to that particular incident did you have occasion to be in his presence regarding another criminal offense?

A Yes, sir.

Q Or statement regarding –

A Yes, sir.

Q When did that occur?

A As we were coming up toward Bellville Meadows it was a girl out there that we had heard –

Q Slow down and speak up so all the members of the jury can hear you.

A It was a girl standing outside of Bellville Apartments that we had heard that was running her mouth about the Murphy's Mart case.

Q When was that that this occurred? I mean, that you heard about it and you were with Melvin, I mean with Coleman Gray?

A This was after the Murphy's Mart [774] robbery.

Q How many days after the Murphy's Mart –

A It was inside a week; something like that.

Q Sometime between the date of the offense and when Coleman was arrested?

A Yes, sir.

Q All right. Now, where were you when you were discussing about – Or tell us what happened. Excuse me. Go ahead.

A We came up and she didn't speak, or something, and we had heard that she had been saying something about the case. And he said she keep on running her mouth he going to fuck her up.

And we got out the car and went up to his apartment. We were searching through the newspaper for some information on the Murphy's Mart and when he got through the paper, when he got through the paper he told me – that's when he was talking about the girl he told me he had knocked off outside.

Q All right. Did he tell you he had knocked off some other girl outside?

A Yes, sir.

Q And the newspaper that he had, did it have any photograph on it?

A Yes, sir.

Q Whose picture was it?

[775] A Sorrell girl.

Q Sorrell girl?

A Yes, sir.

Q Were you familiar or had you heard about that particular murder?

A Yes, sir.

Q What did you do after he pointed to that picture?

A He just went on, find the newspaper he was talking about, about Murphy's Mart.

Q Now, when you say the Sorrell girl, which Sorrell girl was it?

A Lisa Sorrell.

Q Lisa Sorrell?

A Yes, sir.

Q The mother?

A Yes, sir.

MR. FERGUSON: No further questions for this witness.

MR. MOORE: We have no questions at this time, Your Honor.

THE COURT: All right. That's all. Do you need these last two witnesses? Do you need for them to remain?

MR. MOORE: No, sir; I don't think so. They can be released.

THE COURT: Mr. Ferguson, do you need the last two witnesses?

[776] MR. FERGUSON: No, sir. Call Detective Slezak.

MR. MOORE: Your Honor, I have a motion I would like to make out of the presence of the jury, please.

THE COURT: All right. Ladies and gentlemen, step in the jury room, please.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, at this time I would like to renew my motion to have excluded from evidence during this penalty trial any evidence pertaining to any other – any felony for which the defendant has not yet been charged. The basis for this would be that it beyond the scope of what's been testified to. What's been testified to is we have a statement from someone who said the statement was made to him. We don't have any evidence that this man has been charged with the Sorrell murders. We don't have any evidence that he's been indicted by the Sorrell murders. All we have here is a statement made to an inmate. And if the Commonwealth's Attorney wants to introduce hardcore evidence as a result of those

murders to the jury it will do nothing [777] more than inflame the jury and will infer precisely and concisely that this man did the killing, which, in essence, will mean that he will have been tried of the Sorrell murders right in our very presence today.

And as I have argued to the Court earlier in this trial today, we have had no notice of this, short of the last twenty-four hours we have had notice of it. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. He's not been indicted.

We understand that the authority relied upon by the Commonwealth is *Watkins vs. Commonwealth,* a recent decision, but our position is that this scope that the Commonwealth intends to enter at this time, that the scope of the evidence to be adduced by the Commonwealth at this time is beyond the *Watkins* case because the *Watkins* case in which one murder, of a defendant convicted of murder as is to Gray right here, is when the Commonwealth during the penalty trial put on testimony of another murder. It was of another murder, that of which the defendant had already been charged. It was another murder that the defense counsel were actively participating in representing the defendant.

And we ask, Judge, not to allow this evidence. Defense was taken by surprise. And the jump from Mr. Gray's statement to the co-defendant – and that's [778] all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. It's too great a jump, too

broad a jump and only serves to inflame the passion of the jury so that justice in this particular case cannot be rendered. And we ask that the evidence be excluded for that basis.

MR. FERGUSON: Your Honor, on this issue there are a couple of things I'd like to state. First of all, I would state for the record that I advised Mr. Moore prior to yesterday afternoon. They were well aware that the Commonwealth intended to introduce evidence. In fact, I told him before this trial began that the Commonwealth – that if this defendant was found guilty at the sentencing phase we intended to introduce evidence which would show this defendant has confessed to other crimes involving murder, specifically the Sorrell murder.

In addition, Mr. Moore was fully aware of that fact.

The Commonwealth, at this point, has introduced evidence which if believed by this jury would be sufficient, coupled with obviously establishing the corpus delicti, that he could be convicted.

The *Watkins* case is very clear on cases or crimes where a person has not been convicted. [779] The *Watkins* case says, "it is essential that the jury have before it," and it underlines it, "*all possible relevant information* about the individual defendant whose fate it must determine." "We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted."

It's very clear that the Commonwealth is entitled to introduce this evidence because this evidence goes to the whole thrust of what the Commonwealth must prove in a

sentencing hearing, and that is that this defendant has a proclivity for violence and that he does represent a high degree of future dangerousness to the community. And the Commonwealth must establish that fact through the evidence and must prove it beyond a reasonable doubt that he would represent a probability of future dangerousness.

What better way to prove future dangerousness than to show that this man has committed other murders? And that's precisely what the Commonwealth is doing.

I think based on the *Watkins* case, the *Quintana* case, as well as the *Peterson* case the Commonwealth is clearly without any question whatsoever entitled to introduce this evidence.

I would therefore respectfully ask that the Court overrule defense counsel's motion.

MR. MOORE: Your Honor, I would like to take a matter up with the Court. I hate to [780] take up any more time, however, the Commonwealth has mis-stated something that's put the shadow on the defense counsel, and I want to clear it up.

He has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.

But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.

My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that.

So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.

THE COURT: Well, gentlemen, you were aware of it yesterday.

MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

THE COURT: At the conclusion of [781] the guilt stage we discussed the penalty stage, and at that time Mr. Ferguson made you aware of what his evidence was going to be. I'm going to overrule your motion and note your exception in the record. let's take a short recess.

MR. MOORE: Thank you.

TRIAL CONTINUING IN THE COURTROOM AFTER A BRIEF RECESS AND THE MEMBERS OF THE JURY PANEL WERE PRESENT IN THE COURTROOM AND SEATED IN THE JURY BOX.

THE COURT: All right, sir.

MR. FERGUSON: Call Detective Slezak.

DETECTIVE M. I. SLEZAK, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A M. I. Slezak, police officer, City of Chesapeake.

Q And Detective Slezak, would you [782] speak up loud – it's difficult to hear in here – so all the members of the jury can hear you? Detective Slezak, I want to take your attetion [sic] back to December the 10th of 1984. Did you have occasion to respond to a location here, in the Greenbriar section of the City of Chesapeake?

A It wasn't near Greenbriar. It was approximately five miles from Greenbriar.

Q All right. Speak up, now, so all the members of the jury – Talk louder than normal so they can hear you, if you would.

A It was approximately five miles from Greenbriar. It was in the Deep Creek borough of Chesapeake.

Q Tell us what happened when you arrived at the scene, what you observed, et cetera.

A There was a four door burgundy colored Honda automobile. Preliminary check –

Q Speak up, Detective. I'm having a hard time hearing you.

A All right, sir. When we approached the vehicle the windows were blacked out. We couldn't see inside. Finally entrance was gained in the car and we found the

body of a black female inside. She was later identified, and subsequent investigation revealed that there was another body, that of a small child, found in the trunk of the car.

Q Who was the person found in the [783] front?

A Lisa Sorrell.

Q All right. And who was found in the trunk?

A Shanta Sorrell, her daughter.

Q All right. Now, Detective Slezak, I have some photographs which I would like to show you and ask if you can depict, or tell us what that photograph depicts.

A Yes, sir. This is the righthand side, or the passenger side, of the vehicle with the doors open. This is the vehicle that was – that contained Lisa's and Shanta's body. This is Lisa Sorrell –

Q Speak up, now.

A This is Lisa Sorrell in the right front passenger's side of the vehicle.

Q All right, sir.

MR. FERGUSON: Your Honor, I would ask that this photograph be marked and introduced into evidence as Commonwealth's Exhibit Number "1", or excuse me, number –

MR. MURDEN, CLERK: "45".

MR. FERGUSON: I'm sorry, "45".

MR. FERGUSON, Continuing-

Q Detective Slezak, I show you this second exhibit and ask you if you can identify that?

[784] A This is the right, or the left hand side of the vehicle, showing the interior of the same vehicle.

Q All right. What is shown on that particular photograph?

A The debris on the front, in the front floorboard of the car, paper that had been set on fire, the interior damage to the car where it had been burned, a match on the front seat, the victim's body, the car seat, child car seat in the back seat, the interior damage of the vehicle.

Q All right. Was there any burnt damage inside the car itself?

A Oh, yes, sir.

Q Tell us about that.

A The visors, the sunvisors in the car had melted down from the heat. There was charring on the left front door or the driver's door. There was soot throughout the interior of the car.

Q How about on the windshield, the inside?

A All over the interior of the car. It appeared that it had been blacked out. You couldn't see inside the car for the residue on the windows.

Q All right, sir. Detective Slezak, I show you –

MR. FERGUSON: Your Honor, I would ask that that photograph also be introduced [785] into evidence as a Commonwealth's exhibit.

MR. MOORE: Note my objection, Your Honor.

MR. FERGUSON, Continuing-

Q I ask You to identify that next photograph.

A This is a photograph of the same vehicle. It shows the burnt damage to the door, the interior of the floorboard where paper and items from the victim's purse had been removed and had been burned. It shows the match on the front seat, front seat of the car, driver's seat.

Q All right.

A And it shows the victim.

Q When you opened the door were you able to detect any odors or smells?

A It smelled smokey.

Q All right. Detective Slezak, I show you this next photograph.

MR. FERGUSON: Your Honor, I would ask that that also be marked and introduced.

THE WITNESS: There was also a –

MR. MURDEN, CLERK: "47".

THE WITNESS: an odor I would describe as a plastic odor. It smelled like plastic or glue; something similar to that.

[786] *MR. FERGUSON, Continuing-*

Q Detective Slezak, I show you this next photograph and ask you if you can identify that?

A Yes, sir. It's taken from the passenger's side of the car. It shows Lisa Sorrell in the floorboard and on the seat, the sun visors melted and deposited on the back of her jacket.

Q Was that this dark substance that's on the – appears in this photograph?

A Yes, sir.

MR. FERGUSON: I ask that that be marked and introduced as a Commonwealth's exhibit.

MR. FERGUSON, Continuing-

Q I show you this next photograph and ask you if you can tell us what that depicts?

A It depicts the interior of the vehicle, the items –

THE COURT: Speak up, now, so all the members of the jury can hear.

A – items that were removed from the victim's purse, paper articles. There was a trash bag inside, that was burned; a cassett [sic] tape in the vehicle; a match, a burnt match; the victim's body; and the interior of the vehicle.

Q All right.

MR. FERGUSON: I would ask that [787] that be marked and introduced as a Commonwealth's exhibit.

MR. MURDEN, CLERK: "49".

MR. FERGUSON, Continuing-

Q All right. Now, Detective Slezak, I show you this next photograph and ask you if you can tell us what that depicts?

A Yes, sir. It's the trunk of the same car that was in the other photographs, and it is a photograph of Shanta Sorrell, the victim's daughter.

Q All right.

MR. FERGUSON: Your Honor, I would ask that be marked and introduced into evidence as a Commonwealth's exhibit.

MR. FERGUSON, Continuing-

Q I show you this next photograph and ask you if you can tell us what that depicts?

A It's Lisa Sorrell.

Q And what is that? Where was that taken, or when was that taken?

A This was taken at police headquarters in the evidence building.

Q Is that –

A After she was removed from the car.

Q And is this the same individual [788] that you found in the front seat of the vehicle:

A It is.

Q Finally, I show you this.

MR. FERGUSON: I ask that that be marked and introduced as a Commonwealth's exhibit in these proceedings.

MR. FERGUSON, Continuing-

Q Finally, I show you one other photograph and ask you if you can identify that last one?

A It's the body of Shanta Sorrell.

Q Does that show a frontal view of her?

A Yes.

Q And is that the same individual that you found in the trunk of the vehicle?

A It is.

Q Now, when you all arrived at that particular location was the trunk shut or open?

A It was closed.

Q How did you all happen to get in the trunk?

A With a – There's a release mechanism on the interior of the car. We lifted the release mechanism and it opened.

Q Speak up, now.

A There's a release mechanism on [789] the interior of the car by the driver's seat. We pulled it and it released the lock. Then we lifted the trunk lid.

Q Were you able to visibly observe any –

MR. FERGUSON: Excuse me, Your Honor. I ask that this be marked and introduced into evidence as Commonwealth's Exhibit Number –

MR. MURDEN, CLERK: "52".

MR. FERGUSON: – "52".

MR. FERGUSON, Continuing-

Q Detective Slezak, let me ask you this: When you observed this did you observe any visible signs of injury specifically to Lisa Sorrell that you could observe with your eyes?

A There was what – There was a reddish sibstance [sic] on her clothing and parts of the car that appeared to be blood. It wasn't until I saw her again at the medical examiner's office that I saw any wounds.

Q All right now, both of the individuals that you found at the locations when you found them, were they both dead at that time?

A Yes.

Q Now, did you have occasion – Were they then taken to the medical examiner's office for [790] purpose of conducting an autopsy to determine cause of death?

A Yes, sir; they were.

Q And was that autopsy conducted by Dr. Presswalla of the medical examiner's in this Tidewater area?

A It was.

Q And were the two people that he examined, in fact, the same two people that you had found in the automobile itself in Chesapeake?

A They were.

Q And you, I believe, previously identified the two people as Lisa Sorrell and Shanta Sorrell; is that correct?

A Yes, sir.

Q Which one was the mother?

A Lisa.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Detective Slezak. I would like to pass the photographs in question to the jury in the order they were – Is there one – I believe there's one still outstanding up there.

THE COURT: Before this is done, do you gentlemen have any questions about the photographs? Do you want to use them for any purpose?

[791] MR. MOORE: We have expresed [sic] our opinion with respect to them, Your Honor.

THE COURT: Do you want to use them in any examination before we give them to the jury?

MR. MOORE: No, sir.

THE COURT: All right.

(The previously marked photographs were published to the jury.)

THE COURT: All right. Mr. Moore, do you have any questions of the detective?

CROSS EXAMINATION

BY MR. MOORE:

Q Was this case highly publicized, Detective Slezak?

A It was publicized.

Q Newspapers, radio, television?

A Yes, sir; certainly.

Q In fact, it went on for several days; didn't it?

A Yes, sir.

Q Received regional coverage in the news media?

A I think that would be accurate.

[792] Q And the details of the crime were made visible by virtue of the news media to everybody; were they not?

A What was made visible? I didn't understand you.

Q The scene of the crime, the automobile, the burnt automobile, and the bodies?

A The vehicle was visible to the news media. The bodies were not visible.

Q So, they were viewed by photographing or filming it, or whatever, seeing the condition, the burned condition and things of that nature; is that correct?

A No, that's not correct.

Q Well, if they filmed it from a distance they can certainly tell it; can't they?

A The exterior of the car would be seen by the news media, but not the interior.

Q It was never seen by anybody?

A Well, certainly it was. To my knowledge it has not been seen by any member of the news media.

Q Well, the details of the evidence were made public knowledge by virtue of newspaper articles; was it not?

A There was some indication, or there was some references made in the newspapers that were inaccurate. Certainly some of the information [793] that was obtained was released to the news media, but all of it was not; no, sir.

Q The fact that it was inaccurate doesn't necessarily mean that there's anything unusual about that; does it?

A Well, there are inaccuracies everywhere.

Q Yes, sir. Has this man been charged with these crimes?

A No, sir.

Q What's a copycat killing?

A It's a similar crime that's generally referred to that someone else had committed.

Q I mean, ya'll are taught that at the crime line or crime school, are you not, what a copycat killing is?

A I think there's some reference made to it.

Q And basically it's what, now?

A Where one person would pattern a crime after another individual to take the suspicion off of him.

Q A copycat crime basically is somebody who learns about how to do one crime by reading about another; is that right?

A It may come to him by reading it or it may be some idea of his own.

MR. MOORE: No further questions.

[794] MR. FERGUSON: I have no further questions. I would ask that Detective Slezak remain. I don't think I'll need him, but rather than release him this second I would ask him to remain just momentarily.

THE COURT: All right. That's all.

MR. FERGUSON: Dr. Presswalla.

(Discussion off the record.)

DR. FARUK B. PRESSWALLA, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q would you state your name for the Court and members of the jury, please?

A Faruk, F-a-r-u-k, Presswalla, P-r-e-s-s-w-a-l-l-a.

Q And what is your position or occupation, Dr. Presswalla?

A I'm the Deputy Chief Medical Examiner for the Tidewater Region.

Q And in that capacity what do you do? What is your function in that capacity?

A I investigate sudden, unexpected, [795] unusual, unnatural, and violent deaths, deaths in legal custody, and deaths in which cremation or disposing at sea is the method of disposition of the body.

And in the course of the investigation I do autopsies when necessary with a view to determining the cause and manner of death, and obtaining any medical, legal information which may help explain the circumstances surrounding the death.

Q Can everybody on the jury hear? All right. If you can't if you would raise your hand, I'll get him to sepak [sic] up. Thank you.

Now Dr. Presswalla, how long have you been a medical examiner with the State of Virginia?

A For the past approximately nine years.

Q All right.

MR. FERGUSON: Mr. Eason, is there any question about his qualifications as an expert?

Mr. Eason: We would certainly stipulate as to his qualifications, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON, Continuing-

Q Dr. Presswalla, in that regard did you have occasion to examine and conduct an autopsy on the bodies of Lisa Sorrell and Shanta Sorrell?

A I did.

[796] Q All right. And Dr. Presswalla, would you tell us when did you make this examination of those two people?

A This was on the 11th of December, 1984.

Q And what did your – Let's take them one at a time. What did your examination of Shanta Sorrell reveal?

A Shanta Sorrell was a baby, three years old, and my examination revealed that she had died as a result of carbon monoxide inhalation. Carbon monoxide is a noxious gas which is produced any time there is incomplete combustion. So, whenever there is any kind of combustion part of the combustion is complete, which produces carbon dioxide, and the part that's incomplete produces carbon monoxide.

This is present in any fire, whether it be smouldering [sic] or hot. It's also present in automobile exhausts. She died as a result of inhaling this which then combined with the hemoglobin in the blood and therefore prevented the blood from carrying oxygen, and kills the person.

Q Dr. Presswalla, did you examine specifically, the windpipe of her body?

A Yes.

Q What did you find in the windpipe?

A I found evidence of soot inhalation, that is, carbon from smoke. This is something that [797] would take place with a fire, especially if there is smouldering [sic]. You do not see soot if it's from the automobile exhaust.

Q All right. And Dr. Presswalla, did you have occasion to file your report in this particular case regarding Shanta Sorrell?

A I did.

Q Dr. Presswalla, I show you first of all this photograph and ask if you can identify that photograph for the members of the jury?

A Yes, I can.

Q And who is that a photograph of?

A This is Shanta Sorrell, on whom I performed this autopsy, about whom I was referring just now.

Q Dr. Presswalla, does this medical examiner's report, is this your report that you filed in this particular case, excluding the hearsay information about how you came into contact with the bodies and those kinds of things?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I would like the record to reveal that we have struck from the summary certain hearsay information about how the body was discovered, where it was discovered, that Dr. Presswalla, I assume, has no personal knowledge of; is [798] that correct?

THE WITNESS: Well, that was reported to me in the normal course of business by my local medical examiner who went to the scene. I did not go to the scene.

MR. FERGUSON: Right. That's fine. Your Honor, we would offer the photograph into evidence as Commonwealth's Exhibit Number-

MR. MURDEN, CLERK: "53".

MR. FERGUSON: And the autopsy report as Number "54".

MR. EASON: Your Honor. we have no objection to the report as it has been changed by the court, of course, subject to our continuing objection on the whole matter.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, did you also conduct an examination and autopsy on Lisa Sorrell?

A Yes, sir; I did.

Q Would you tell us the results of that examination?

A Lisa Sorrell was a young lady, and she showed evidence of gunshot injuries. She had six gunshot wounds to the back of her head, all located in an area to the back and to the right of the midline, right about here. (Indicating.) Of these six gunshot injuries, two of the bullets had [799] passed through the head and exited and I could not find those bullets. The other four had stayed in the head and I recovered those bullets and they appeared to be .32 caliber bullets. Apart from the gunshot injuries she had only a minor scrape on her wrist.

Q Dr. Presswalla, I show you this photograph and ask you if you can identify that for the members of the jury?

A Yes, I can.

Q What is that?

A This is a photograph depicting the back of the head where I shaved the head to depict the gunshot wounds of Lisa Sorrell.

Q All right. And I show you this second photograph and ask you if you can identify that?

A Yes. That's a closer view of the same area.

Q All right. Shows it more clearly, the six wounds?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, I would ask that these two photographs be marked and introduced into evidence as Commonwealth's exhibits in these cases.

MR. FERGUSON, Continuing-

[800] Q Finally, I show you this medical examiner's report and ask if that is the report that you filed in these proceedings and sets forth the nature and extent of the wounds?

THE COURT: I'm only going to admit one of them.

MR. FERGUSON: I will simply offer, the first one will be sufficient. I think it shows the face, as well as the wounds. That's sufficient.

THE COURT: All right.

MR. MURDEN, CLERK: "55".

MR. FERGUSON, Continuing-

Q Does this reflect your report, Dr. Presswalla?

A Yes, sir; this does.

Q And as in the other case, I believe, in the report that is being filed any evidence which may constitute hearsay, that is that you didn't have, was deleted from the report or from the summary; is that correct?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, we would offer these two exhibits into evidence as Commonwealth's exhibits. I would withdraw the earlier.

[801]THE COURT: That's the one you want?

MR. MURDEN, CLERK: That's been marked.

THE COURT: That's the one you handed me that you wanted.

MR. FERGUSON: I appologize [sic]. I misunderstood the Court. It makes no difference.

MR. MOORE: If it doesn't make any difference, we want the smaller one.

MR. FERGUSON: It makes no difference. That's fine. I'll simply withdraw this one.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, specifically were you able to determine the cause of death first of all of Shanta Sorrell?

A Yes, sir; I was.

Q What was the actual cause of death?

A She died as a result of carbon monoxide intoxication.

Q And were you also able to determine the cause of death of Lisa Sorrell?

A Yes, sir; I was.

Q And what was the cause of death of Lisa Sorrell?

A She died as a result of multiple gunshot wounds, namely the six gunshot wounds to her head which injured her brain.

Q Dr. Presswalla, in reference to [802] Lisa Sorrell, could you tell us whether any one of those six wounds to the back of the head could have been fatal?

A Yes, sir.

Q Any one of the six would have been fatal alone?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Dr. Presswalla. I would like to show the exhibits to the members of the jury.

THE COURT: All right, Mr. Moore?

(The previous exhibits were published to the jury.)

MR. EASON: We have no questions, Your Honor.

THE COURT: All right. Do you need Dr. Presswalla any further?

MR. FERGUSON: We have no further need for Dr. Presswalla. As far as I'm concerned he's free to be excused.

THE COURT: All right, Doctor, thank you. You may go.

THE WITNESS: Thank you, sir.

MR. FERGUSON: Your Honor, the Commonwealth rests.

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[881] * * *

CLOSING ARGUMENT
BY MR. FERGUSON:

Members of the jury, I first of all would like to again thank you. You have sat through four days, this is the fifth day, and it's certainly been a long and trying trial. At the same time, as I indicated to you yesterday, without you [sic] presence here there's no way this case could even have been tried. I would like to thank you for your attention as well as your presence during the course of this case.

Today we're at a little different situation than we were yesterday. Yesterday you-all had to decide whether this man was guilty of the crimes charged. That is, whether or not he was the trigger man.

Today that is no longer an issue, for you have already resolved that issue. Therefore, the only question before you today is one of what sentence should be imposed on this defendant.

Now, in determining that question the Court has given you instructions which pretty well set forth very clearly what the Commonwealth must prove in order for you to impose the death penalty, and the Commonwealth must prove to you beyond a reasonable doubt one of two things.

Number one, we must prove to you that after consideration of this defendant's background and prior [882] history – and you have heard all the testimony that's been presented today relative to his prior background and history – that there is a probability that he would

commit criminal acts of violence that would constitute a continuing serious threat to society. That is, is he a threat to society in the future? And so, at issue is does he have a future dangerousness situation, is he a danger to the community in the future, and that is the question, based on his prior history and background.

Of, if for some reason you didn't believe that prong was there, you could convict him based on the crime itself; that is the murder, the brutal murder of Richard McClelland, was outrageously or wantonly vile, horrible, or inhumane in that it involved either torture, depravity of mind, or aggravated battery to the victim.

And the Commonwealth only has to prove to you one of those two prongs of the test.

Now members of the jury, I would suggest to you that not only has the Commonwealth proven one of those two prongs, the Commonwealth in this case has proven both prongs of the test beyond a reasonable doubt. And I would like to take just a few moments with you to go through and show to you how we have proven each of the two elements or the prongs, the test prongs, under which the death penalty could be imposed.

* * *

[887] You have also heard testimony in this particular case from Melvin Tucker relative to a statement that the defendant made to him relative to the Sorrell murders. And the defendant, Coleman Gray, told Tucker as they were going up the steps one day – it was some girl that had been saying things or the rumors were going through the neighborhood about his involvement in the Murphy's

Mart case – and Coleman Gray, in very graphic language indicated that he could take her off just like he had taken some other girl off.

And then when he went upstairs when he was talking about that other girl, he showed Melvin Tucker [888] who he was talking about in the newspaper and pointed to a picture of Lisa Sorrell.

Now, you have heard testimony from Detective Slezak in this case, who went to the scene and discovered the automobile where the body of Lisa Sorrell, the mother, and a young child were found in the trunk, and the testimony and the evidence has shown that that car was set on fire just like the one in the Richard McClelland case. And not only that, but that the method of death, the method of execution for Lisa Sorrell was by .32 caliber weapon, same caliber weapon as we have in this case, six shots to the back of the head – identical to the Richard McClelland case. She was stuffed in the car, matches found on the seat, tried to burn the car up; obviously the fire went out.

But it didn't go out in time enough for Shanta Sorrell, for Shanta Sorrell was put in the trunk of the car. That child had no way to get out, and she lay there and died of carbon monoxide poison with soot backed up all in her throat, and Dr. Presswalla indicated that was from the fire, not from any gasoline or car running. When you find soot in the throat that's from the car being burnt up.

Now, members of the jury, if that pattern of criminal conduct does not indicate a person who would have a probability of continuing to commit criminal [889] acts of violence or criminal acts in the future, then there is no

such record that can, for the crimes that you have heard about that this defendant has committed and been convicted of, or alternatively admitted doing, are simply atrocious. They're murder, robberies, brutal systematic execution-style crimes; and those crimes are the same kinds of crimes that you had before you when you heard the facts on the Murphy's Mart case.

So, when you couple the vileness of the Murphy's Mart case itself and look at this man's prior criminal history it leads to one and only one conclusion, and that is that Coleman Wayne Gray, after considering his history and background, not only there's a probability, but that frankly there is an absolute certainty that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

So, based on that evidence there can be no question that the Commonwealth in this case has not only proven beyond a reasonable doubt, but has proven beyond all doubt that this defendant has a propensity to future dangerous criminal conduct. On that prong alone you, as members of the jury, have the right to impose a penalty of death.

* * *

[893] Now members of the jury, you have heard the evidence, and I suggest to you that not only has the Commonwealth proven beyond a reasonable doubt both prongs of the test necessary for you to impose a sentence of death, we have proven to you beyond all doubt two things. Number one, that the defendant does constitute a serious continuing threat to society in that there is a probability that he will continue to commit future crimes

of violence. There can be no question about that. He's committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter; he shot Ron Whitte, and it's fortunate that the last bullet didn't strike him or one of the members of his family.

* * *

[896] I think what it boils down to is there are simply certain crimes in which a defendant demonstrates that he is no longer capable of living in the human society, and Coleman Wayne Gray has demonstrated that in this case. He's demonstrated it in the Whitte case. He's demonstrated it in the killing of the man in California, and he's demonstrated it in the brutal manner in which Lisa and Shanta Sorrell were murdered.

This man has forfeited his right to live with other human beings, not because of anything anybody's done to him, but by his own acts.

* * *

[897] There is really very little I can say at this point. I have said all that really can do. The only thing I can leave you with is this: Coleman Wayne Gray has been tried. He has had twelve jurors to sit and listen to this case. He has had a separate penalty hearing. He's been represented by very capable attorneys. He has been afforded all due process there is.

* * *

[907] *FINAL ARGUMENT*

BY MR. FERGUSON:

Q Members of the jury, I will not be long. There are a few things I would like to say to you. First of all, Mr. Moore talks about [908] your sitting in judgment of another human being. Let me ask you a question: Did Coleman Gray sit in judgment of Richard McClelland; did he sit in judgment of Ron Whitte; did Coleman Gray sit in judgment of the man in California that he killed; and did he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?

Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

You have already determined guilt in this case. That is not an issue. Your only concern is what is a just punishment.

As I indicated to you earlier, and as you took your oath, you took an oath that if a proper case is presented, each of you indicated to the Court when Judge Godwin asked the question, If a proper case is presented to you can you personally impose the penalty of death? And each and every one of you indicated yes.

Well, members of the jury, in this particular case the Commonwealth has presented to you a proper case for the death penalty. We have shown not only the facts of the McClelland case itself, but also the other brutal, vicious, and vile acts that this defendant has committed.

It seems to me that he has already been [909] given an opportunity, a chance to straighten himself out. And it is very, very clear, or should appear clear to you based on the evidence that he has no regard for anybody else's human life. He laughed about the killing of McClelland, thought it was funny. And he aslo [sic] carried out these other brutal, brutal, vicious acts.

Members of the jury, Mr. Moore has talked to you about a number of Biblical citations and I don't intend to stand up here and quote the Bible for you. The same time he was quoting about mercy and the other things, and forgiveness, I ask you one question: What mercy was shown by him to Richard McClelland or any of the other victims that you have heard about? And the answer is absolutely none whatsoever.

I also point out to you that the Law of Moses recognized three different modes or form of executing capital offenders, straight out of the Bible, by burning, stoning, or hanging. The Law of Moses also imposed the death penalty for some twenty different types of crimes, one of which was murder.

In addition to that in the New Testament Paul states the principal of capital punishment in Acts 25:11, for he says that,

> "If I be an offender or have committed anything worthy of death, I refuse not to die."

[910] Well, members of the jury, that's exactly what we have in this case. And based upon that testimony I ask you to find this defendant – You have already found him guilty, and I ask you to impose a sentence of death; for I think the question that each of you must answer in this

case is not whether you can live with yourselves if this defendant is sentenced to death. The question is, can you live with yourselves after hearing all the testimony, all the evidence, all the different crimes of murder and otherwise that this defendant has committed, can you live with yourselves if you don't? And that is the question.

Based on that I ask you to impose a sentence of death. If there was ever a case where it's justified the Commonwealth has presented it to you today and throughout this week.

Thank you very much.

* * *

Coleman Wayne GRAY

v.

COMMONWEALTH of Virginia. (Two Cases)

Record Nos. 860373, 860374.

Supreme Court of Virginia.

April 24, 1987.

Present: CARRICO, C.J., and COCHRAN,* POFF, COMPTON, STEPHENSON, RUSSELL and THOMAS, JJ.

STEPHENSON, Justice.

Coleman Wayne Gray was indicted for the capital murder of Richard M. McClelland in the commission of robbery, Code § 18.2-31(d), the robbery of McClelland, the abduction of McClelland, the use of a firearm in the commission of each of those felonies, and the arson of McClelland's automobile. The robbery occurred on May 2, 1985, at Murphy's Mart store in the City of Portsmouth where McClelland was the manager. A jury convicted Gray of all counts, fixing his punishment at life imprisonment on the robbery charge, life imprisonment on the abduction charge, 10 years in the penitentiary on the arson charge, and four years in the penitentiary on each of the firearm charges.

Pursuant to the bifurcated-trial procedure for capital murder cases, a separate penalty trial was conducted on the capital murder conviction. Code § 19.2-264.4. In the penalty trial, the Commonwealth presented evidence of

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* Justice Cochran participated in the hearing and decision of this case prior to the effective date of his retirement on April 20, 1987.

aggravating factors and Gray introduced evidence in mitigation.

The jury fixed Gray's sentence at death. Following a sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court imposed the death sentence. Thereafter, the trial court entered judgments on all the verdicts.

We have consolidated the automatic review of Gray's death sentence with his appeal from his conviction of capital murder, Code §§ 17-110.1(A) and – 110.1(F), and have given them priority on our docket, Code § 17-110.2. By order entered May 8, 1986, the appeals of the other convictions were certified from the Court of Appeals and consolidated with the capital murder appeal. Code § 17-116.06.

I

PRETRIAL PROCEEDINGS

A

Constitutionality of the Death Penalty Statute.

Gray makes various challenges to Virginia's death penalty statute, each of which we have previously rejected. He first contends that the death penalty violates the proscription against cruel and unusual punishment contained in the Federal and Virginia Constitutions. In accord with our previous decisions, we again reject this contention. *See, e.g., Boggs v. Commonwealth*, 229 Va. 501, 505, 331 S.E.2d 407, 411 (1985), *cert. denied*, 475 U.S. ___, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Stockton v. Commonwealth*, 227 Va. 124, 134, 314 S.E.2d 371, 378, *cert. denied*,

469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Whitley v. Commonwealth*, 223 Va. 66, 77-78, 286 S.E.2d 162, 168-69, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982); *Bassett v. Commonwealth*, 222 Va. 844, 851, 284 S.E.2d 844, 849 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1095, 254 S.E.2d 116, 118-19, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698-99, 251 S.E.2d 202, 211-12, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979); *Smith v. Commonwealth*, 219 Va. 455, 476, 248 S.E.2d 135, 148 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

Gray next contends that the aggravating factors which a jury must find in order to impose the death penalty, *see* Code § 19.2-264.2,[1] are unconstitutionally

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[1] Code § 19.2-264.2 reads as follows:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

vague and overbroad and "an open invitation to allow an arbitrary and irrational decision." We reaffirm our previous rejection of this contention. *See, e.g., Watkins v. Commonwealth*, 229 Va. 469, 490, 331 S.E.2d 422, 437-38 (1985), *cert. denied*, 475 U.S. ___, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986); *Stockton*, 227 Va. at 134-35, 314 S.E.2d at 378; *Bunch v. Commonwealth*, 225 Va. 423, 441, 304 S.E.2d 271, 281, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983); *Smith*, 219 Va. at 476-78, 248 S.E.2d at 148-49.

Finally, Gray argues that Virginia's sentencing scheme is "overbroad, vague and facially unconstitutional" because Code § 19.2-264.2 allows a jury to examine an accused's "past criminal record" while Code § 19.2-264.4(C)[2] provides for examination of his "prior history." For reasons expressed in previous decisions, we again reject this argument. *See Watkins*, 229 Va. at 487, 331 S.E.2d at 435-36; *LeVasseur v. Commonwealth*, 225 Va. 564, 593-94, 304 S.E.2d 644, 660 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

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[2] Code § 19.2-264.4(C) reads as follows:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

B

Admissibility of Statements Made by Gray to the Police.

Gray contends that his statements to the police were "involuntary." He argues that his statements were not voluntary under either the requirement set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), or the "totality of circumstances" standard.

Gray gave statements to the police on two occasions. The first statement was given to Officer Freeman on the morning of May 22, 1985. The second statement was given to Sergeant Lilley and Detective Bunker on the evening of May 23, 1985.

Freeman testified at the suppression hearing that at 8:30 a.m. on May 22, 1985, Gray, who was in a holding cell at the Suffolk jail, "shouted out that he wanted to talk to me." Freeman walked to the cell, and Gray said he "wanted to get something off his mind that had been bothering him."

Approximately 9:30 a.m., after Gray had eaten breakfast, he was brought to Freeman's office. Freeman told Gray that he would not talk to him unless Gray executed a "Legal Rights Advice Form." Freeman then presented Gray with a form and read each question on the form to him. Gray executed the form, which reads as follows:

SUFFOLK POLICE DIVISION

Legal Rights Advice Form

Date May 22, 1985

1. Do you understand what you may be charged with?
Armed Robbery
Yes

2. Do you understand that you have the right to remain silent?
Yes

3. Do you understand that any statement you make may be used as evidence against you in a court of law?
Yes

4. Do you understand that you have a right to talk to a lawyer and to have the lawyer present during all questioning, if you so desire?
Yes

5. Do you understand that if you cannot afford to hire a lawyer, a lawyer will be appointed to represent you and be present during all questioning, if you so desire?
Yes

6. The above rights have been fully explained to me, and I sign this paper with complete understanding of them. I further state that I waive these rights and desire to make a statement. I understand that I have the right to stop answering questions at any time.
Yes

7. This statement is completely free and voluntary on my part without any threats or promises from anyone.
Yes

Witness
/s/ Lt. W. A. Freeman

Witness _____

Date 5/22/85 Time 9:33 A.M.

Suffolk Det. Bur
Exact Location

/s/ Coleman W. Gray
Signature of Person Being Advised of His Rights
Date 5/22/85
Time 9:35 A.M.

_____
Exact Location

Freeman testified that after executing the form, Gray, without any questioning by Freeman, became "emotional," and began walking around the room, hitting the wall and exclaiming, "the man wasn't supposed to die." Freeman suggested that Gray "[c]alm . . . down, just sit down [and] [t]ell me what happened."

Without any questioning or interruption by Freeman, Gray proceeded to give him a detailed account of how the offenses had occurred. Gray admitted he had participated in the commission of the crimes with Melvin Tucker, but stated that Tucker actually shot McClelland. Gray told Freeman: "I'm not going to let you write anything. When we get into court it will just be your word against mine." After the interview, Freeman immediately returned to his office and reduced his recollection of Gray's statements to typewritten form.

On the evening of May 22, Gray told Detective Lilley that he wanted to talk with him, saying he would tell "everything." Lilley told Gray that he would talk with him after the arraignment the following day. On the

morning of the 23rd, Gray again told Lilley that he wanted to talk with him. Lilley first contacted Gray's court-appointed counsel and arranged for him to interview Gray. When he arrived at the police station, Gray's counsel conducted a lengthy interview with him.

After his attorney left, Gray again "demanded" in the presence of the Suffolk Chief of Police and Detective Bunker that he be allowed to speak with Lilley. Bunker testified at the suppression hearing that Gray asked him what he should do. Bunker asked Gray, "[W]hat did your attorney tell you to do?" Gray said, "My attorney told me to not say anything," to which Bunker responded, "Well, then you should do what your attorney said." Gray, however, said, "No, I want to talk to Sergeant Lilley."

Thereafter, Lilley was contacted and he, Bunker, and Gray went to Lilley's office. Gray executed another rights form containing essentially the same questions and answers as the one he had executed for Freeman the preceding day. Gray then gave Lilley a lengthy and detailed statement in question and answer form. The statement was tape-recorded on a machine that was in full view of Gray at all times, and he saw tapes being changed. When transcribed, the statement consisted of 78 typewritten pages. In his statement to Lilley, Gray again admitted his participation in each of the crimes for which he was charged, but continued to assert that Melvin Tucker was the person who shot McClelland.

Gray contends on appeal, as he did at the suppression hearing, that he would not have made any statements had he known that an unwritten statement could be used against him. He also claims he did not fully

understand what his signature on the rights form meant. Additionally, Gray claims that the police made certain statements to him that were coercive or threatening or that contained promises of leniency. The police denied making threats, promises, or coercive statements.

The trial court found that Gray desired to make the statements and did so without promises, inducements, or intimidation. The court also concluded that Gray understood thoroughly his constitutional rights as set forth in Miranda.

A defendant's waiver of his Miranda rights is valid only if the waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. Whether a statement is voluntary is ultimately a legal rather than factual question. *See Miller v. Fenton*, 474 U.S. 104, ___, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985). Subsidiary factual questions, however, are entitled to a presumption of correctness. *Id.* at ___, 106 S.Ct. at 451. The test to be applied in determining voluntariness is whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973). In determining whether a defendant's will has been overborne, courts look to "the totality of all the surrounding circumstances," *id.* at 226, 93 S.Ct. at 2047, including the defendant's background and experience and the conduct of the police, *Correll v. Commonwealth*, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); *Stockton*, 227 Va. at 140, 314 S.E.2d at 381.

Gray was nearly 28 years old at the time of the offense. He possessed a high school equivalency diploma and stated that he could read and write. Gray initiated both conversations with the police. He stated that he understood the legal rights advice form, and his 12-year involvement with police and law enforcement procedures corroborates his statement. In addition to carefully explaining the waiver forms, the police repeatedly told him that they could make no promises or guarantees, and Gray indicated he understood. The police told Gray numerous times that he had a right to have his attorney present, a right to stop answering questions at any time, and that anything he said could be used against him. Gray indicated that he understood and repeatedly told the police that he wanted to talk.

Our review of the record reveals that Gray's right to have counsel present and his privilege against self-incrimination were "scrupulously honored" by the police. *See Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). From an assessment of the totality of all the surrounding circumstances of the present case, we conclude, as did the trial court, that Gray's statements to the police were made freely, knowingly, and voluntarily and that his Miranda rights were not violated.

C

Gray's Telephone Statement to Officer Moore.

Gray moved to suppress certain statements that he made over the telephone to Officer Moore, contending that there was an insufficient identification of Gray as the party with whom Moore spoke. The trial court refused to

suppress the statements, concluding that the matter was a question for the jury's consideration, and Gray assigned error to this ruling. Because a proper foundation had been laid for the admission of these statements, we find no merit to this contention.

D

Searches and Seizures.

Gray contends that the seizure of certain evidence pertaining to McClelland's murder found in his home violated his Fourth Amendment rights. He also claims that the search of his automobile was illegal.

On May 10, 1985, police officers went to Gray's residence armed with a search warrant that authorized a search of his house for marijuana, paraphernalia, and other drug-related items. During the search, the officers found and seized a quantity of marijuana, cocaine, and drug paraphernalia.

The police also seized other items, unrelated to the drug charge, that connected Gray to the McClelland murder. Among the items seized were a quantity of .32-caliber cartridges, a pistol holster, a jewelry box and jewelry bearing Murphy's Mart price tags, and "gym bags" similar to those reported missing from Murphy's Mart.

Gray does not contest the validity of the search warrant as it related to the drug charge; nor does he question the propriety of the seizure of the drug-related items. Moreover, he concedes that during the conduct of a valid search, the police are entitled to seize evidence of other

crimes or contraband without securing an additional warrant. *See Harris v. United States*, 331 U.S. 145, 155, 67 S.Ct. 1098, 1103, 91 L.Ed. 1399 (1947). Gray also concedes that given the character of the evidence specified in the warrant, the police were permitted to search the places where evidence of the murder was found. *See Holloman v. Commonwealth*, 221 Va. 947, 949, 275 S.E.2d 620, 622 (1981). Gray contends, nonetheless, that the search for drug-related evidence was a sham; he says the true purpose of the search was to look for evidence related to the McClelland murder.

The Attorney General acknowledges that the police knew that Gray was a potential suspect in the McClelland murder when they secured the search warrant and suspected that evidence pertaining to the murder might be discovered during the course of the drug search. The Attorney General contends, however, that seizure of such evidence was proper. We agree.

The validity of the warrant authorizing the search and seizure of drug-related evidence is not an issue in this appeal. Drug-related evidence was found and seized, and Gray was arrested for possessing marijuana. The search was not a sham merely because Gray was a possible suspect in the murder case and the police anticipated that during the drug search they might find evidence relating to the murder. *See Horne v. Commonwealth*, 230 Va. 512, 517, 339 S.E.2d 186, 190 (1986). The police had a right to be in Gray's residence to conduct a search for drugs, and in the course of the search, they were entitled to seize evidence of other crimes that was in plain view. *Blair v. Commonwealth*, 225 Va. 483, 490, 303 S.E.2d 881, 885-86 (1983).

After searching the residence and arresting Gray on the marijuana charge, the police asked Gray for permission to search his automobile. Gray consented to the search, and the police seized a gasoline can, a siphon hose, and three pairs of gloves from the trunk of the automobile.

Gray does not deny that he gave his consent for the search, but he claims the consent was not voluntary. He asserts that in view of all the circumstances, particularly his arrest and being in handcuffs, his consent was the product of police coercion.

The burden is on the Commonwealth to prove that a consent is voluntary. *Lowe v. Commonwealth*, 218 Va. 670, 678, 239 S.E.2d 112, 117 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978); *Hairston v. Commonwealth*, 216 Va. 387, 388, 219 S.E.2d 668, 669 (1975), *cert. denied*, 425 U.S. 937, 96 S.Ct. 1671, 48 L.Ed.2d 179 (1976). Whether a consent to a search was voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. The mere fact that a defendant is in custody is not enough in itself to demonstrate a coerced consent to search. *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 828, 46 L.Ed.2d 598 (1976); *Lowe*, 218 Va. at 678, 239 S.E.2d at 117.

The trial court concluded that the consent was voluntary. Nothing in the record suggests that Gray was threatened or intimidated. When asked if they could search his car, Gray said, "Go ahead and search it." The police told Gray he could withdraw his consent at any time, and he never retracted it. Moreover, after he was arrested and

taken to the Suffolk police station, he executed a form authorizing the search of his car. From a totality of all the circumstances, we conclude that Gray's consent to search his automobile was given freely and voluntarily.

E

Identity of Informant.

In a pretrial hearing, Gray sought, *inter alia*, to discover the identity of the informant relied upon by the police for the issuance of the search warrant. The trial court, after hearing Gray's testimony and the evidence of the police officer who executed the affidavit for the warrant, denied the request. The court specifically found that "credible evidence [shows] that there was an informant [and] that the search warrant was . . . valid," and concluded that the informant's identity was privileged.

On appeal, Gray argues that "[t]he failure of the Court to allow [him] to examine the alleged informant, or even to confirm his existence, denied [him] the basic rights of the 5th Amendment's Due Process and the 6th Amendment's right to confront his accusers." The Supreme Court rejected these identical constitutional arguments in *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

Generally, the identity of a person furnishing the prosecution with information concerning criminal activities is privileged. *See Webb v. Commonwealth*, 137 Va. 833, 836, 120 S.E. 155, 156 (1923); Annot. 76 A.L.R.2d 262 (1961 & Supp.1986). The purpose of the privilege is to further

and protect the public's interest in effective law enforcement. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). Revealing an informant's identity would discourage private citizens from furnishing the police valuable information; thus, informants demand anonymity to protect themselves and their families. The police often depend upon professional informants for information about crimes. If the public becomes aware of the dual role played by an informant, the informant becomes useless to the police, and persons who might otherwise provide information are discouraged from rendering assistance. *See McCray*, 386 U.S. at 308-09, 87 S.Ct. at 1061; *Roviaro*, 353 U.S. at 59, 77 S.Ct. at 627; *Webb*, 137 Va. at 836, 120 S.E.2d at 156.

Although he concedes the existence of the privilege rule, Gray contends, nevertheless, that the circumstances of the present case warrant an exception. He looks to *Roviaro* as support for his contention. *Roviaro*, however, is inapposite.

In *Roviaro*, the informant had been an active participant in the crime. The Court stated that he "had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged." *Id.* at 55, 77 S.Ct. at 625. After reviewing the particular circumstances of Roviaro's trial, the Court noted that the informant was the only participant in the crime other than the accused and therefore his possible testimony was "highly relevant," that he might have "disclosed an entrapment[,] thrown doubt upon [Roviaro's] identity or on the identity

of the package[, or] . . . testified to [Roviaro's] possible lack of knowledge of the contents of the package. . . . " *Id.* at 63-64, 77 S.Ct. at 629. The Court concluded that "under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee." *Id.* at 65, 77 S.Ct. at 630.

The circumstances of Gray's case are altogether different. Nothing in the record suggests that the informant participated in or knew anything about the crimes for which Gray stands convicted. Unlike *Roviaro*, the informant in the present case could not have been helpful in Gray's defense of his capital murder charge. Indeed, the affidavit for the search warrant shows that the information furnished was limited to Gray's drug activities and the informant was a person who had furnished the police with reliable information of narcotic activities in the past. We conclude, therefore, that under the circumstances of the present case the privilege rule applies and the trial court did not err in its ruling.

F

Psychiatric Examinations.

In response to Gray's motion, the trial court appointed a private psychiatrist to evaluate Gray and assist in his defense. Gray contends, nonetheless, that the court erred in refusing to provide him with funds so he could choose his own psychiatrist. The contention is meritless.

Before an indigent defendant is entitled to a court-appointed independent psychiatrist to assist the defense in a capital case, there must be a threshold showing that

his sanity is likely to be a significant factor in his defense. *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985); *Tuggle v. Commonwealth*, 230 Va. 99, 104, 334 S.E.2d 838, 841 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986). Additionally, when the Commonwealth in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, the Commonwealth must provide the defendant the assistance of a psychiatrist on the issue. *Ake*, 470 U.S. at 86-87, 105 S.Ct. at 1098-99; *Tuggle*, 230 Va. at 107-08, 334 S.E.2d at 843-44. It is clear, however, that an indigent accused does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S.Ct. at 1097; *Pruett v. Commonwealth*, 232 Va. 266, 276, 351 S.E.2d 1, 7 (1986); *Beaver v. Commonwealth*, 232 VA. 521, 528, 352 S.e.2d 342, 346 (1987); *Tuggle*, 230 Va. at 107, 334 S.E.2d at 843.

In the present case, Gray made no threshold showing that his sanity would likely be a significant factor in his defense, and the Commonwealth did not present psychiatric evidence that he would be a danger to society in the future. Nevertheless, the trial court appointed a private psychiatrist to assist the defense. Thus, Gray received more than is constitutionally mandated, and clearly the trial court did not err in refusing to allow Gray to choose his own psychiatrist.

After furnishing Gray with the private psychiatrist, the trial court, on the Commonwealth's motion, and over Gray's objection, ordered that Gray be sent to Central State Hospital for a psychiatric examination to determine his mental condition at the time of the offense and

whether he might be dangerous in the future. Although Gray complains about the entry of the order, the record shows that he refused to answer all questions posed by the hospital staff. Moreover, no psychiatric evidence was produced at either the guilt phase or the penalty phase of the trial. We conclude, therefore, that Gray's contention that the trial court erred in ordering the examination is without merit.

G

Refusal of Funds for an Investigator and Statistical Reports.

Gray contends that the trial court erred in denying his request for a publicly paid investigator. The contention is without merit. *See Watkins*, 229 Va. at 478, 331 S.E.2d at 430; *Stockton*, 227 Va. at 140-41, 314 S.E.2d at 382; *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983); *Martin v. Commonwealth*, 221 Va. 436, 445-46, 271 S.E.2d 123, 129-30 (1980). A publicly paid investigator for an indigent defendant is "an act of judicial grace not constitutionally required." *Quintana*, 224 Va. at 135, 295 S.E.2d at 646. For the same reasons, we reject Gray's contention that he is entitled to public funds to secure statistical reports regarding the imposition of the death penalty upon blacks accused of murdering whites.

H

Commonwealth's Attorney's Election to Prosecute Gray Rather Than Melvin Tucker.

Both Gray and Melvin Tucker were indicted for capital murder. Afterwards, the Commonwealth's Attorney elected to try only Gray on the charge of capital murder and entered into a plea bargain agreement with Tucker whereby he would be tried on a charge of first-degree murder. Gray contends that to vest a prosecutor with such unbridled discretion renders the imposition of the death sentence upon Gray "cruel and unusual punishment" in violation of the Eighth Amendment to the Federal Constitution.

Ample evidence of motive and means supports the Commonwealth's decision to try only Gray on the capital murder charge. Less than two months prior to the murder, McClelland, manager of a Murphy's Mart store, had fired Gray's wife, Melinda, from her job at the store. The day after McClelland terminated Melinda, Gray visited McClelland at the Murphy's Mart store and discussed her termination with him for about 15 minutes. Eleven days after McClelland discharged Melinda, Gray stole a .32-caliber pistol from a friend's home. The same gun was used to murder McClelland. Gray told one witness several times that he was "going to get" McClelland for firing his wife.

In addition to Tucker's testimony that Gray was the actual perpetrator (the "trigger man") of the capital murder, two witnesses testified that Gray had told them he killed McClelland, and another witness testified that he had overheard Gray admit to someone else that he was

the killer. Gray told Melvin Tucker and two of the witnesses that he had to kill McClelland because McClelland knew him and could identify him. On the other hand, Melvin Tucker did not have any personal acquaintance with McClelland prior to the crime.

The institution of criminal charges is a matter of prosecutorial discretion. *Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984). Nothing in the record suggests that the Commonwealth's Attorney acted arbitrarily or abused his prosecutorial discretion. We reject the contention that in exercising his discretion he violated the constitutional proscription against cruel and unusual punishment.

I

Place of Incarceration.

Gray was tried in the City of Suffolk. Immediately after his arrest for capital murder, Gray was moved from the Suffolk City jail to the Newport News City jail. Several weeks before the trial, Gray was transferred to the Hampton City jail. Both the Newport News and Hampton jails are located within 45 miles of Suffolk. The record shows that security problems, including Gray's own safety, dictated that he not remain in the Suffolk City jail.

Although Gray concedes that his counsel "conferred in person with [him] on a frequent basis," he contends, nonetheless, that placing him in other locations when the Suffolk jail was available denied him effective assistance of counsel and due process in violation of the Federal Constitution. We do not agree.

While Gray's incarceration in other jails was an inconvenience to his counsel, he was not denied access to counsel. Moreover, the court permitted Gray to remain at the Suffolk City jail for several hours on the evenings of the trial so his attorneys could consult with him. Nothing in the record supports his contention that his counsel was ineffective as a result of his incarceration outside of Suffolk.

J

Discovery of Witnesses' Statements.

In a discovery motion, Gray sought, *inter alia*, the opportunity to inspect and copy statements that Melvin Tucker and the three other witnesses had given to the Commonwealth prior to trial. The trial court ordered that these statements be furnished to Gray "if and when said witnesses testify in this matter and before said testimony is given." Because Gray believed he should be furnished this information a reasonable time prior to trial, he assigns error to the court's ruling.

On appeal, Gray argues that "any inconsistencies between the statements these four individuals gave to the Commonwealth and their subsequent testimony at trial would be of tremendous importance to [his] defense and more importantly, possibly exculpatory." However, Gray has not told us, and the record does not disclose, how he has been prejudiced by not receiving these statements earlier. He alleges no inconsistencies between the statements and the witnesses' testimony; nor does he explain how the statements were exculpatory.

Gray was furnished these statements before the witnesses testified, and his counsel vigorously cross-examined the witnesses. Because Gray has suffered no harm or prejudice as a result of the court's ruling, we reject his contention.[3]

II

JURY MATTERS

A

Change of Venue or Venire.

Gray claims the trial court erred in refusing to grant a change of venue or, alternatively, a change of venire. He bases his claim on alleged widespread publicity of the crime in the community, but makes no allegation that the publicity was inaccurate or intemperate. Gray presented no affidavits suggesting widespread community bias and submitted only three newspaper articles. The information in the newspaper articles was factually accurate, nonprejudical, and noninflammatory. In response to extensive questioning by the court and counsel during *voir dire*, each venireman who qualified indicated that his decision

[3] Similarly, we reject Gray's contention that the trial court erred in refusing to declare a mistrial because the Commonwealth failed to disclose the name of Carl Bond, who was incarcerated with Gray for a period of time. Bond's testimony regarding a conversation with Gray about the McClelland murder contradicted the testimony of another inmate. Because Gray himself discovered Bond's name and whereabouts and called him as a witness at trial, we conclude that Gray suffered no prejudice.

would not be affected by anything he had heard or read about the case.

The decision whether to change venue or venire is a matter within the sound discretion of the trial court, and its ruling will be reversed only upon an affirmative showing on the record that the discretion was abused. *Watkins*, 229 Va. at 481-82, 331 S.E.2d at 432; *Washington v. Commonwealth*, 228 Va. 535, 544, 323 S.E.2d 577, 584 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); *LeVasseur*, 225 Va. at 577-78, 304 S.E.2d at 651; *Newcomer v. Commonwealth*, 220 Va. 64, 67, 255 S.E.2d 485, 487 (1979); *Poindexter v. Commonwealth*, 218 Va. 314, 319, 237 S.E.2d 139, 142 (1977). Nothing in the record suggests that the trial court abused its discretion in denying a change of venue or venire.

B

Composition of the Jury.

Forty-three veniremen, of whom 33 were white and 10 were black, were summoned to appear for Gray's trial. The record establishes that the venire panel was properly selected at random. *See* Code §§ 19.2-260, 8.01-343 to -363. Of the 43 veniremen, only 36 prospective jurors underwent a complete, individualized *voir dire*. Of these 36 veniremen, eight were black. Six of the black veniremen were struck for cause by the trial court because each voiced unequivocal objections to the imposition of the death penalty.[4] *See Witherspoon v. Illinois*, 391 U.S. 510, 88

[4] Gray incorrectly states that "8 out of 10 Negroes or 80%" of the veniremen were struck for cause because they objected to

S.Ct. 1770, 20 L.Ed.2d 776 *reh'g. denied*, 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186 (1968); *LeVasseur*, 225 Va. at 576, 304 S.E.2d at 650; *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). On Gray's motion, the court struck for cause venireman Holt, the seventh black, because Holt's father had been the victim of a recent robbery-murder.

After the court had ruled on all challenges for cause and the required number of veniremen had been qualified, only one black, Alknah Thomas, remained. The Commonwealth used its third peremptory strike to remove Thomas.

While recognizing that it is constitutionally permissible for a court to exclude a venireman who voices an absolute objection to the imposition of the death penalty, *see Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Witherspoon*, 391 U.S. at 518, 88 S.Ct. at 1775, Gray contends that the exclusion of such veniremen in the present case "is a violation of the rights provided to [him] under the 6th [and 14th Amendments] of the U.S. Constitution for an impartial jury" and precluded him from being tried "by a group of his peers." He contends that because of the views blacks purportedly hold

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the death penalty. The record clearly shows that only six veniremen were disqualified on this ground. It is not clear from the record that the six veniremen were black. However, because the Commonwealth does not challenge Gray's assertion that the six were black, we assume they were.

respecting imposition of the death penalty,[5] their exclusion pursuant to *Lockhart* and *Witherspoon* constitutes the use of a "discriminatory criterion." *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1717, 90 L.Ed.2d 69 (1986) (reaffirming the general rule that jury members must be selected in accordance with a non-discriminatory criterion).[6] We find no merit to this contention.

At the outset, we note that a black defendant is not constitutionally entitled to be tried by members of his own race. *Batson*, 476 U.S. at ___, 106 S.Ct. at 1716-17; *Strauder v. West Virginia*, 100 U.S. 303, 305, 10 Otto 303, 25 L.Ed. 664 (1880); *Watkins*, 229 Va. at 491-92, 331 S.E.2d at 438. A defendant does have a constitutional right, however, to be tried by jury members selected pursuant to neutral and non-discriminatory guidelines. *See Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia*, 100 U.S. 339, 10 Otto 339, 25 L.Ed. 676 (1880). As Gray concedes, the Supreme Court recently held in *Lockhart* that a death-qualified jury does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community. 476 U.S. at ___, 106 S.Ct. at 1764. *See also Pruett*, 232 Va. at 277, 351 S.E.2d at 8; *Waye*, 219 Va. at 690-91, 251 S.E.2d at 207.

The *Lockhart* Court stated that "the Constitution presupposes that a jury selected from a fair cross-section of

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[5] Gray presented no empirical data supporting his conclusion that blacks as a group oppose the death penalty.

[6] The ruling in *Batson* applies retroactively to all cases, state or federal, pending on direct review and not yet final. *Griffith v. Kentucky*, 476 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart*, 476 U.S. at ___, 106 S.Ct. at 1770. In Gray's case, each of the prospective jurors removed for cause stated unequivocally that he or she could not impose the death penalty in any case and, therefore, could not apply the laws of the Commonwealth. The trial court had a duty to remove those veniremen. We conclude, therefore, that the Commonwealth's removal for cause of the six veniremen who voiced absolute objections to imposing the death penalty was accomplished pursuant to a non-discriminatory criterion.

Gray further contends that he was denied "the opportunity to be tried by a group of his peers" because the Commonwealth used one of its peremptory strikes to remove venireman Thomas. In Batson, the Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at ___, 106 S.Ct. at 1719. The Court then concluded that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at ___, 106 S.Ct. at 1722-23. To establish such a prima facie case the defendant:

> [F]irst must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at ___, 106 S.Ct. at 1723 (citations omitted).

In the present case, Gray made no timely objection at trial regarding the peremptory striking of Thomas by the Commonwealth's Attorney. Thus, the Commonwealth's Attorney was not afforded an opportunity to explain his reason for the strike, and the trial court had no opportunity to decide whether the reason was constitutionally acceptable. Nevertheless, nothing in the record raises an inference that the Commonwealth's Attorney used his peremptory strike to exclude Thomas from the jury on account of his race. Indeed, it seems apparent from a reading of the following excerpt of Thomas' voir dire that it was highly unlikely he would vote for the death penalty under any circumstances.

> THE COURT: Could you in a proper case impose the death penalty?
>
> JUROR THOMAS: No.
>
> THE COURT: You could not?
>
> JUROR THOMAS: (Nods head negatively.)
>
> THE COURT: You could not in any way impose the death penalty?

JUROR THOMAS: Yea, I will if I have to.

THE COURT: That's what I said. Could you in a proper case impose the death penalty?

JUROR THOMAS: Yes, yes, yes. If I have to.

THE COURT: Now, we're still talking about a capital murder case. Could you also in a proper case impose the lesser penalty of life imprisonment?

JUROR THOMAS: Yea.

. . . .

[COMMONWEALTH]: Your Honor, I would like to just ask a couple of questions to clarify a couple of things. Mr. Thomas, you indicated that in a proper case you said that – Could you personally vote to impose the death penalty on somebody that's been convicted of capital murder?

JUROR THOMAS: Can I do that?

[COMMONWEALTH]: Could you vote to give somebody the death penalty in a proper case that's been convicted of capital murder? You, yourself? Could you vote to give a man the death penalty?

JUROR THOMAS: No.

[COMMONWEALTH]: You could not do that?

JUROR THOMAS: If I have to do it I would.

[COMMONWEALTH]: I don't mean if you have to do it. If you had your choice. There are

two sentences in this case. He can either be sentenced if convicted of capital murder to life in the penitentiary or to the death penalty.

JUROR THOMAS: I vote for the life.

[COMMONWEALTH]: You would vote for life. Would you vote automatically for a life sentence no matter what the facts?

JUROR THOMAS: No, it's got to be what he did.

[COMMONWEALTH]: Excuse me?

JUROR THOMAS: Depends on what he did.

[COMMONWEALTH]: Depends on what he did?

JUROR THOMAS: That's right.

[COMMONWEALTH]: That's what I'm trying to get straight. You said immediately you would vote for the life imprisonment. If you heard the evidence and determined guilt first and you found the person guilty of capital murder and you then had to decide between voting for the death penalty or voting for life imprisonment could you vote, if the facts justified it, to sentence a man to death or vote for the death penalty? Could you personally vote to do that?

JUROR THOMAS: Yea, I can.

[COMMONWEALTH]: You could? Okay. I have no further questions, Judge.

[DEFENSE COUNSEL]: No questions, Your Honor.

Clearly, Thomas gave an internally contradictory statement concerning his ability to vote for the death

penalty. His equivocation was a reasonable, nonracial basis for the Commonwealth's Attorney's strike. Significantly, the Commonwealth's Attorney also peremptorily struck two white jurors who, during voir dire, expressed similar uncertainty about imposing the death penalty. We will not infer purposeful discrimination by the peremptory strike of one black, when, as previously noted, the record indicates that there existed a neutral and nondiscriminatory basis for the strike.

C

Venireman Duplissey.

Gray assigns error to the trial court's refusal to exclude venireman William Duplissey for cause.[7] Duplissey is a former police officer, having served for 15 years in the County of Nansemond and the City of Suffolk. He later served as a security guard at Newport News Shipbuilding and Drydock Company. His occupation at the time of trial did not involve police or security duties. He last testified in court in 1974. On voir dire, he stated that he could render a fair and impartial verdict based on the evidence.

A person is not automatically excluded from a jury because of an association with law enforcement personnel, provided he demonstrates that he can be impartial. *Clozza v. Commonwealth*, 228 Va. 124, 129, 321 S.E.2d 273, 276 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). Whether a venireman should be

[7] Gray's defense counsel subsequently removed Duplissey with a peremptory strike.

excluded from a jury is a matter within the sound discretion of the trial court. Because the trial court observes the venireman, its finding is entitled to great weight and will not be disturbed on appeal unless manifest error exists. *Watkins v. Commonwealth*, 229 Va. at 480, 331 S.E.2d at 431-32; *Calhoun v. Commonwealth*, 226 Va. 256, 258-59, 307 S.E.2d 896, 898 (1983).

Duplissey's answers on voir dire support the trial court's finding that, notwithstanding his previous employment in police work, he would be fair and impartial. Thus, we cannot say the court abused its discretion in refusing to strike Duplissey for cause.

D

Alternate Juror Murphy.

During voir dire, the trial court asked a group of veniremen that included George Murphy this question: "Are you or any members of your immediate family employed by any law enforcement agency?" Murphy made no response to the question. Subsequently, Murphy became one of the two alternate jurors.

Prior to the second day of trial, Gray's counsel learned that Murphy's son was currently a member of the Virginia State Police. Gray moved to declare a mistrial, and the trial court denied the motion. Gray assigns error to this ruling.

We reject this contention. Murphy was released from the panel before the case was submitted to the jury. Murphy was merely an alternate and, therefore, did not participate in the jury's deliberations or decision. Because

it is clear that Gray has suffered no harm, this issue is without merit.

E

Refusing to Sequester the Jury.

At the beginning of the trial, Gray moved for the sequestration of the jury, based on the anticipated length of the trial and the publicity it was receiving. The trial court denied the motion. After the jury returned its verdict finding Gray guilty of capital murder, Gray again moved for sequestration of the jury until the penalty phase of the trial commenced the following day. The court also denied this motion. Although Gray makes no specific allegation that failure to sequester the jury adversely affected the trial, he argues that "as a matter of policy, sequestration of a jury in a capital murder case, especially after a guilty verdict has been returned, should be the norm rather than the exception."

A trial court has broad discretion in deciding whether to sequester a jury. Its discretion extends to capital murder cases. Boggs, 229 Va. at 513-14, 331 S.E.2d at 417; Stockton, 227 Va. at 138, 314 S.E.2d at 380; *Justus v. Commonwealth*, 222 Va. 667, 677, 283 S.E.2d 905, 910-11 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982); *Turner v. Commonwealth*, 221 Va. 513, 524-25, 273 S.E.2d 36, 43 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

In the present case, the trial court admonished the jury twice each day during the five-day trial not to discuss the case with others and to refrain from having any

contact with any news media accounts of the trial. Nothing in the record suggests that the jury disregarded the trial court's admonitions. From the record before us, we cannot say the trial court abused its discretion in refusing to sequester the jury.

III

THE GUILT TRIAL

A

Facts.

According to established principles of appellate review, we must view the evidence in the light most favorable to the Commonwealth, the prevailing party at trial. As previously indicated, Richard McClelland was the manager of Murphy's Mart store in the City of Portsmouth. He and the store's security guard worked late the evening of May 2, 1985, both having arrived at the store between 9:30 and 10:00 p.m.

On the same evening, approximately 9:30 p.m., Gray and Melvin Tucker, both "high" from "free basing" cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store. They saw McClelland and the guard inside the store.

Shortly before midnight, McClelland and the security guard left the store in separate automobiles. Gray and Tucker followed them in Gray's automobile, which Gray was driving. McClelland and the guard went to a fast-food restaurant. McClelland went inside the restaurant, and the security guard went through the "drive-thru" and then left.

When McClelland left the restaurant, he drove toward Smithfield. Gray and Tucker continued to follow him. At a stop sign at the intersection of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his automobile in front of McClelland's car and blocked McClelland's way. Gray, armed with a .32-caliber revolver, directed McClelland to get out of his automobile and into Gray's. Gray struck McClelland, and the two men took McClelland's wallet and threatened to harm his family if he did not cooperate. Gray then drove Tucker and McClelland back to the Murphy's Mart store.

When they arrived at Murphy's Mart, Gray forced McClelland at gunpoint into the store while Tucker waited outside in Gray's automobile. Approximately one-half hour later, Gray and McClelland emerged from the store with a shopping cart containing three gym bags filled with money. Gray, Tucker, and McClelland put the gym bags in the back seat of Gray's automobile and McClelland was told to get back into the car.

Gray then drove to a service station to obtain gasoline. He put some gas in the tank of the car and filled a gas can that was in the car's trunk.

After paying for the gas purchase, Gray drove McClelland and Tucker to the Frederick campus of Tidewater Community College. After passing the college, Gray backed the car down a small side road and ordered McClelland out of the car. Gray then took McClelland to a place approximately 15 to 20 feet behind the automobile and ordered him to lie down on the ground. McClelland obeyed Gray's command.

McClelland begged Gray not to hurt or shoot him, and Gray assured him that he would not be harmed. As McClelland lay face down on the ground, Gray fired six pistol shots in rapid succession into McClelland's head from a distance of 3 to 18 inches. Gray told Tucker as they drove away that he had had to kill McClelland because McClelland knew him.

Gray and Tucker then drove to the intersection where they had left McClelland's car. Gray told Tucker that he was going to burn McClelland's car to destroy evidence. Gray took the can of gasoline from the trunk of his car and doused the interior of McClelland's automobile with gasoline. He lit a match, threw it into McClelland's car, and closed the door. Gray and Tucker subsequently returned to Gray's apartment to count the stolen money, which amounted to between $12,000 and $13,000.

Some days later, Tucker and Gray went to the Nansemond Treatment Plant where Tucker was employed, and Gray threw the revolver into a contact tank. The police later recovered the revolver after Gray showed them its location.

The police discovered McClelland's body at the scene of the crime on the morning of May 3 just a few hours after he had been shot. An autopsy performed later that day established that McClelland had received six close-range .32-caliber gunshot wounds to the head, any one of which could have caused his death.

B

Photographs Depicting Victim's Body and Wounds.

The trial court, over Gray's objections, admitted into evidence six color photographs of the victim's body, including five of his bloody head. Three photographs depicted the victim's body as found at the scene of the crime; the remaining three photographs were taken at the autopsy. Gray contends the court erred in admitting these photographs because they "served no purpose other than to inflame the jury." We disagree.

The admission of photographs is a matter resting within the sound discretion of a trial court. *Wise v. Commonwealth*, 230 Va. 322, 330, 337 S.E.2d 715, 720 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986); *Watkins*, 229 Va. at 482, 331 S.E.2d at 433; *Poyner v. Commonwealth*, 229 Va. 401, 417, 329 S.E.2d 815, 827, *cert. denied*, 474 U.S. ___, 106 S.Ct. 189, 88 L.Ed.2d 158, 474 U.S. ___, 106 S.Ct. 189-90, 88 L.Ed.2d 158, 474 U.S. ___, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985); *Washington*, 228 Va. at 551, 323 S.E.2d at 588; *Jones v. Commonwealth*, 228 Va. 427, 450, 323 S.E.2d 554, 566-67 (1984); *Coleman v. Commonwealth*, 226 Va. 31, 48, 307 S.E.2d 864, 873 (1983), *cert. denied*, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984); *Bunch*, 225 Va. at 436-37, 304 S.E.2d at 278; *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 520, 524, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 51, 286 S.E.2d 172, 177 (1982); *Martin*, 221 Va. at 447, 271 S.E.2d at 130; *Stamper*, 220 Va. at 270, 257 S.E.2d at 816. Photographs of a victim are relevant if they tend to show motive, intent,

method, premeditation, malice, or the degree of atrociousness of the crime. *Stockton*, 227 Va. at 144, 314 S.E.2d at 384; *Waye*, 219 Va. at 692, 251 S.E.2d at 208; *Smith*, 219 Va. at 467, 248 S.E.2d at 143. Photographs that accurately portray a scene created by an accused in the commission of an offense are not rendered inadmissible because they are gruesome or shocking. *Washington*, 228 Va. at 551-52, 323 S.E.2d at 588.

In the present case, the photographs of the victim, though gruesome, accurately portrayed what the defendant had created and were relevant to establish intent, malice, premeditation, and atrociousness of the crime. We note, moreover, that the trial court rejected two photographs offered by the Commonwealth because they were duplicative of other photographs that were admitted. We hold that the trial court did not abuse its discretion in admitting the six photographs into evidence.

C

Admissibility of the Autopsy Report.

Gray contends that because the pathologist who performed the autopsy on the victim testified at trial, the admission of the autopsy report constituted error. He argues that the report has "no probative value and only tends to inflame the jury." We do not agree.

We have previously rejected this identical contention. *See Fitzgerald v. Commonwealth*, 223 Va. 615, 630, 292 S.E.2d 798, 806-07 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983). Moreover, Code § 19.2-188 authorizes the admission of the report.

D

Requirement that Gray be in Leg Irons.

Gray contends that the trial court erred in requiring him to remain in leg irons during his trial. The court concluded that the restraints should be imposed because of the serious nature of the charges against him and to maintain security. The court, however, took pains to ensure that the jury remained unaware that Gray was shackled. Moreover, when Gray took the witness stand to testify during the sentencing phase, the leg irons had been removed outside the jury's view.

The conduct of a trial is left to the sound discretion of a trial court. *Watkins*, 229 Va. at 484, 331 S.E.2d at 433; *Justus*, 222 Va. at 676, 283 S.E.2d at 910. Requiring leg irons is a proper exercise of a court's discretion, and the court's decision need not be made upon a formal evidentiary hearing. *Frye v. Commonwealth*, 231 Va. 370, 381-82, 345 S.E.2d 267, 276 (1986).

In the present case, the trial court's ruling was reinforced by Gray's extensive and violent criminal history and the gravity of the offense for which he was being tried. Thus, we conclude that the trial court did not abuse its discretion in requiring that Gray remain in leg irons during the trial.

E

Sufficiency of the Evidence of Capital Murder.

Gray claims the evidence is insufficient to support his conviction of capital murder because the testimony of Melvin Tucker, the co-defendant, and the three other

prison inmates who testified that Gray admitted killing McClelland is incredible. We do not agree.

It is a jury's function to judge the credibility of the witnesses and the weight of their evidence. The jury has the opportunity to observe the witnesses' demeanor while testifying, to consider their interest in the outcome of the case, and to determine from all the circumstances of the case which witnesses are more believable. *See Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); *Coppola*, 220 Va. at 252, 257 S.E.2d at 803.

The trial judge, who also observed the witnesses and considered the evidence, has approved the jury's verdict. A trial court's judgment approving a jury's verdict is entitled to great weight on appeal and will not be disturbed unless it is contrary to law or plainly wrong. Code § 8.01-680; *Stockton*, 227 Va. at 145-46, 314 S.E.2d at 385.

The Commonwealth relied in large measure upon the testimony of Tucker and the other three prison inmates to establish that Gray actually perpetrated McClelland's murder. Although Gray has attacked their veracity, the jury was in the best position to assess their credibility. Moreover, from other circumstances proved, the jury reasonably could infer that Gray was the "trigger man." The murder weapon had been stolen by Gray. Gray, not Tucker, was acquainted with McClelland. Because McClelland had fired Gray's wife from her job at Murphy's Mart, Gray had a motive to kill McClelland. Indeed, he told a friend that he was "going to get" McClelland. The jury and the trial court were convinced beyond a reasonable doubt that Gray was the perpetrator of the murder.

We cannot say that the judgment is plainly wrong or that the evidence that Gray was the "trigger man" is incredible as a matter of law. Accordingly, we conclude that the Commonwealth successfully proved "beyond a reasonable doubt that motive, time, place, means and conduct concur in pointing out the accused as the perpetrator of the crime." Quintana, 224 Va. at 143, 295 S.E.2d at 651 (citation omitted).

IV

THE PENALTY TRIAL

A

The Sorrell Murders.

During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.

Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.

A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the causes of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

Gray contends on appeal that the trial court erred in admitting evidence of the Sorrell murders. He argues that the evidence was "highly inflammatory and inherently prejudicial." Gray points out that at the time of the trial he had not even been charged with the commission of these crimes. Gray says the only evidence linking him to these murders was the testimony of Melvin Tucker, the co-defendant with whom the Commonwealth had reached a plea bargain agreement.

In the penalty phase of a bifurcated capital murder trial, "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). Consistent with *Gregg*, Code § 19.2-264.4(B) provides that the jury may consider evidence that includes "the history and background of the defendant." Indeed, "[t]he jury has the duty to consider all the evidence relevant to sentencing, both favorable and unfavorable" before determining whether it is probable that the defendant would commit future acts of violence that would constitute a continuing, serious threat to society. Stamper, 220 Va. at 275-76, 257 S.E.2d at 819. "[E]vidence of prior unadjudicated criminal conduct . . . may be used in the penalty phase to prove the

defendant's propensity to commit criminal acts of violence in the future." Watkins, 229 Va. at 488, 331 S.E.2d at 436. *See Quintana*, 224 Va. at 147-48, 295 S.E.2d at 654. Determining the credibility of witnesses is peculiarly within the province of the jury.[8] Johnson, 224 Va. at 528, 298 S.E.2d at 101; Coppola, 220 Va. at 252, 257 S.E.2d at 803.

Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker. We cannot say Tucker's testimony was incredible as a matter of law.

Moreover, the evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like

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[8] Although he made no objection to Tucker's testimony at trial, Gray now relies on *Lee v. Illinois*, ___ U.S. ___, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), to press the argument that Tucker's testimony was "presumptively unreliable" and should not have been introduced because there were insufficient indicia of reliability to rebut the presumption. *Lee* involved the introduction of a co-defendant's out-of-court written confession incriminating the accused in a double-murder case. The co-defendant did not testify and, thus, was not subject to cross-examination. The Supreme Court held that the inability to cross-examine the co-defendant violated the accused's Sixth Amendment right to confront witnesses. *Id.* at ___, 106 S.Ct. at 2063. In the present case, however, Gray had the opportunity to cross-examine Tucker, and the jury had the opportunity to assess Tucker's credibility and reliability. We conclude, therefore, that *Lee* has no application to the facts of this case.

McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

Gray's admission and the information about the particulars of the Sorrell murders were relevant evidence of Gray's propensity to commit violent acts in the future. We conclude, therefore, that the trial court did not err in admitting this evidence.

B

Criminal Record, History, and Background.

Gray, 28 years old at the time of his trial, has a criminal record dating to 1973. In August 1973, while a juvenile, he was found not innocent of petit larceny and ordered to complete one year of supervised probation. In January 1976, as an adult, Gray was convicted of burglary in Los Angeles, California. For this conviction, he served four days in jail and was placed on probation for one year.

In March 1977, Gray was convicted of disturbing the peace and resisting arrest in the City of Portsmouth, for which he was fined $10.00 and sentenced to five days in jail. The jail sentence was suspended on the condition that he be of good behavior for 12 months.

In May 1978, also in the City of Portsmouth, Gray was found guilty of malicious wounding, attempted robbery, and use of a firearm. He was sentenced to a total of 21 years in prison. In August 1983, he was released on parole. Gray was on parole at the time he committed the offenses involved in these appeals. He also has been

convicted of possession of marijuana with intent to distribute and possession of cocaine.

From November 1983 to May 1984, while on parole, Gray worked at Morrison's Cafeteria. William Palmer, general manager of the cafeteria, testified that Gray's employment was terminated because of his use of profanity. Palmer stated that Gray had a "bad attitude." Thaddeus Eley, a chef at the cafeteria, testified that Gray had told him that he "could kill" Palmer for firing him.

Ronald Whitte testified that in July 1977, while he, his wife, and two small children were bicycling, Gray and another man accosted them. Gray displayed a pistol, ordered Whitte to halt, threatened to kill Whitte, and demanded money from him. When Whitte refused to comply, Gray fired several shots from the pistol, wounding Whitte in the arm and foot.

Lawrence Tucker, who is Melvin Tucker's brother and a convicted felon, testified that, in May 1985, he had overheard Gray recount to Melvin the details of Gray's robbery of the Circle Seafood Restaurant. Gray related the incident to relieve Melvin Tucker's concerns about the Murphy's Mart robbery. Lawrence Tucker stated, "[H]e told Melvin don't worry about it, because he got away with something like that and he can get away with this."

Melvin Tucker testified that Gray told him "he had took the Circle Restaurant off" and showed Tucker the money taken in the robbery. Melvin Tucker also testified that, within a week after the Murphy's Mart robbery, he and Gray heard a rumor that a young woman had been talking about the incident. When they saw the woman on

the street, Gray told Tucker that if "she keep on running her mouth [I'm] going to fuck her up."

Sylvester Joyner and Gray were both incarcerated in the same cell block in the Suffolk City jail. Joyner testified that Gray told him that he had to leave California because "he had killed a guy out there." The jury also heard evidence pertaining to the Sorrell murders, which has been discussed in the preceding section.

Gray called seven witnesses who gave mitigating testimony. Gray, himself, also testified in the penalty phase.

Catrina Hargrove had been a neighbor of Gray for several months preceding his arrest. She had frequent contact with Gray and his wife. She described Gray as a "very nice person" and stated that she had never seen Gray exhibit any anger or hostility toward her or anybody. Hargrove had observed Gray playing with her four-year-old daughter. Hargrove said she was shocked and surprised to learn of Gray's involvement in the murder.

Keith Silver also was a friend and former neighbor of Gray. He had known Gray for approximately four years and for about one year they lived across the hall from each other. He testified that Gray treated Silver's wife and daughter as if they were "family." Silver said he did not believe that Gray was capable of murdering McClelland because such conduct was totally out of character for Gray.

Kelvin Penny, a friend and former co-worker with Gray at Morrison's Cafeteria, testified that Gray was

"great," a "good guy." He also believed that the murder was out of character with his friend.

David Wilson, a contractor for brick work and former employer of Gray, described Gray as a "[v]ery good worker." He stated that Gray got along well with everyone, never threatened anyone, and never got into fights. He also said that the murder was out of character with Gray.

Terry Carter, a probation and parole officer in the City of Portsmouth, testified that Gray had been under his supervision from August 1983 to January 1985. He stated that Gray was punctual in keeping appointments and respectful to him. He never observed any hostility in Gray.

Mavis Spitzer, who had been Gray's probation officer since January 1985, testified that Gray was "always very polite, very well-mannered, very cooperative." She also stated that on her unannounced visits she found his home "always very neat and clean, very tidy."

Rafiq Zaidi, who described himself as a Muslim minister, testified that in January 1985 Gray had been generous in contributing funds to a needy woman and her children. The minister said that the acts involved in the murder were "[t]otally inconsistent" with Gray.

Bishop Maurice Johnson, an elderly retired minister, was well acquainted with Gray. Johnson's wife is related to Gray, and Johnson performed the marriage ceremony for Gray and his wife. Bishop Johnson described Gray as an outgoing person who never exhibited hostility to him or to anyone else.

Gray testified that he was not the "trigger man." He denied any involvement in the Sorrell murders and stated that he had been acquitted of the murder charge in California. Conceding that the part he played in the McClelland murder was wrong, he reiterated that he did not pull the trigger.

C

Jury Instructions.

Gray contends that the trial court erred in refusing four jury instructions he proffered at the penalty phase of the trial. They were identified as Instructions 4A, 4B, 4C, and 4D.

Instruction 4A would have told the jury that it was not required to impose the death penalty even though it believed beyond a reasonable doubt that one or both of the aggravating factors necessary to support a death penalty had been proved. The court did instruct the jury, however, as follows:

> You have convicted the defendant, Coleman Wayne Gray, of capital murder which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> (1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death *or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.*

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

(Emphasis added.)

The above-quoted instruction sufficiently and properly states the statutory framework. *LeVasseur*, 225 Va. at 594-95, 304 S.E.2d at 661. Refused Instruction 4A would have been repetitious of the language that we have emphasized in the granted instruction. "When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle." *Stockton*, 227 Va. at 145, 314 S.E.2d at 384.

Instruction 4B would have told the jury that life imprisonment must be imposed if the jury had a reasonable doubt as to "any fact or conclusion which is required before the death penalty can be imposed." This instruction also is repetitious. The last two paragraphs of the

granted instruction fully cover the principle of law involved.

The trial court properly refused Instruction 4C, which listed specific mitigating factors that the jury could consider and would have told the jury that their decision upon the mitigating factors need not be unanimous. Indeed, failure to list mitigating factors inures to the benefit of a defendant. Whereas aggravating factors are limited and must be listed, "a jury is not so limited in considering mitigating factors, but may consider any and all [such] factors." *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, informing the jury that its decision on mitigating factors need not be unanimous could create confusion in the jurors' minds because they are instructed that unanimity is required to impose the death penalty. *See* Code § 19.2-264.4(E).

Instruction 4D would have told the jury that it "must assume that the Defendant will be executed" if it imposed the death penalty. We assume that Gray requested this instruction to evoke the jury's sympathy. The instruction, a comment upon the obvious, was redundant, and the court properly refused it.

V

SENTENCE REVIEW

Code § 17-110.1(C) mandates that we review the death sentence. In so doing, we are required to consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other

arbitrary factor," and whether the sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*

Contending that the sentence of death was the product of passion, prejudice, or other arbitrary factors, Gray again raises the issue of the court's failure to immediately exclude alternate juror Murphy who had "close family ties to . . . law enforcement." Gray suggests that the trial court "permitted [Murphy] to communicate his opinion to the other jury members throughout the several days leading up to [Gray's] conviction."

Elsewhere in this opinion, we have considered and rejected Gray's contention respecting Murphy. We reiterate, however, that Murphy was merely an *alternate* juror. He did not participate in the deliberations and decisions of the jury. Moreover, there is absolutely nothing in the record to suggest that Murphy "communicate[d] his opinion to the other jury members."

Gray again raises the argument that the photographs of the victim were inflammatory, and we will stand on what we have previously said concerning this issue. We also have addressed Gray's final argument: that the court erred in admitting evidence of the Sorrell murders in the penalty trial. For reasons previously stated, we again reject this contention.

Gray also argues that in our review of the sentence we "should consider the cumulative effect of the errors of the trial court." Because we have found no error in the conduct of either the guilt or penalty trial, we reject Gray's cumulative-effect argument. *See Wise*, 230 Va. at

335, 337 S.E.2d at 723; *Boggs*, 229 Va. at 522, 331 S.E.2d at 422; *Waye*, 219 Va. at 704, 251 S.E.2d at 214.

By its verdict, the jury found that both the "dangerousness" and "vileness" predicates had been proved beyond a reasonable doubt. Gray contends that the evidence does not rise to the level necessary for the imposition of the death sentence based upon either predicate. We do not agree.

Respecting "dangerousness," we look first to Gray's lengthy criminal record. It is significant that in July 1977, during the period in which he was under a one-year suspended jail sentence, Gray participated in the crimes against Ronald Whitte that led to his convictions of malicious wounding, attempted robbery, and use of a firearm. More significantly, however, is Gray's participation in all of the present violent crimes against McClelland while Gray was on parole for the Whitte offenses. His record establishes that from 1976 to 1985 Gray committed 13 felonies, at least nine of which were crimes of violence. This is shocking, especially when we take into account that during this nine-year period Gray was confined in prison for more than five of those years. His record clearly demonstrates a trend towards increasingly violent crimes.

We also look to the testimony relating to Gray's history and background. From this, we learn that he told others he had committed a robbery at the Circle Seafood Restaurant in May 1985 and had locked the restaurant employees in a food freezer. He told another he murdered the Sorrells in 1984. He has threatened the lives of two persons other than McClelland.

We have considered the circumstances surrounding McClelland's murder, especially Gray's arming himself and engaging in a planned enterprise. Additionally, we have reviewed the evidence presented in mitigation. After considering all aggravating and mitigating factors, we conclude that the evidence supports the jury's finding that Gray posed a continuing, serious threat to society.

We turn next to the "vileness" predicate. From the time McClelland fired Gray's wife, Gray planned revenge. He stole the gun that he later used in McClelland's murder. He had his wife sketch the layout of Murphy's Mart. He solicited Melvin Tucker to assist him with the robbery.

On the night of the murder, Gray and Tucker waited about three hours for McClelland to come out of the store and followed him until he reached a deserted intersection. Gray ordered McClelland out of the car at gunpoint, striking him in the face with his hand.

Throughout the ordeal, Gray threatened to harm McClelland's family. Indeed, before entering Murphy's Mart, Gray told McClelland that Tucker would stay outside in the car to "take care" of McClelland's family if he were uncooperative. McClelland never resisted and was totally cooperative.

Gray originally wanted to push McClelland into a contact tank at the treatment plant. However, Tucker would not use his employee status to escort Gray through the plant's entrance gate. Consequently, Gray took McClelland to a remote area by Tidewater Community College and had him lie face down on the ground. Without any provocation whatsoever, Gray fired six bullets

into McClelland's head. In retelling the story of McClelland's murder to an inmate, Gray "laugh[ed] about the fact that he shot and killed the guy, as if it was nothing to him." Gray's laughter and total lack of remorse prompted the inmate to inform the police of Gray's confession.

From our review, we believe the evidence is sufficient to support the jury's finding of "vileness" beyond a reasonable doubt. Indeed, Gray's overall conduct in committing McClelland's murder was outrageously vile and inhuman, in that it involved depravity of mind and aggravated battery to the victim.

Pursuant to Code § 17-110.1(E), we have accumulated and considered the records of all capital murder cases reviewed by this Court to determine whether "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." Stamper, 220 Va. at 284, 257 S.E.2d at 824. From this review, we conclude that Gray's sentence was not excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes similar in nature.

VI

CONCLUSION

We have considered all 41 of Gray's assignments of error and find no reversible error in any of them. Accordingly, the judgments of the trial court will be affirmed.

Record No. 860373 – Affirmed.

Record No. 860374 – Affirmed.

In the Circuit Court for the City of Suffolk, Virginia

Coleman Wayne Gray

v.

Charles E. Thompson

* * *

[32] If I might, Your Honor, respond now to Mr. Ferguson's argument.

We have here two types of claims in my petition, Your Honor, that are there as one – one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. These are claims of law for which no evidence is necessary. And I would certainly submit that the Court can rule on the sufficiency and the legality of those claims, which are simply [33] matters of law to be argued before the Court here today.

Of all of those claims – and Mr. Ferguson has gone through all of them on his motion without arguing at length each one, they are all set forth in the petition for habeas corpus and the two motions to amend.

I would point out that two of them, Your Honor, that I certainly would submit are critical to the proper consideration of this habeas corpus petition, the first one is the use of the testimony of Jeramiah Smallwood. To be sure, there is precedent that even if Mr. Smallwood's testimony was perjured, that it could be used. But in this particular case the – I'd like to comment on the effect of Mr. Smallwood's testimony. The effect that can be gleened from a

reading of the record by someone who was not present at the trial of this case, and also another effect.

A reading of the record would indicate – Well, first I want to point out Mr. Smallwood's testimony was made – was given, Your Honor, in the guilt phase of the trial. Not in the sentencing phase. Mr. Smallwood testified that he had a conversation with Mr. Gray in prison following all of [34] these offenses while Mr. Gray was in pretrial incarceration. And the substance of Mr. Smallwood's testimony was that Mr. Gray admitted to him that he killed McClelland and then he laughed about it. And he in essence made light of what he had done.

There was no need for this testimony in the guilt phase of the trial to establish guilt beyond a reasonable doubt, if one were to read the record and accept the testimony of the witnesses for the Commonwealth. If one were to accept the testimony of the witnesses for the Commonwealth in the light most favorable to the Commonwealth, and that would mean accepting the credibility of those witnesses and attaching weight to their testimony, I would submit that Mr. Smallwood's testimony was not necessary in order to prove guilt beyond a reasonable doubt. That is if one accepted the weight of the evidence and accepted the credibility of the witnesses and attached weight to their testimony.

But I would suggest that that was not the purpose that Mr. Smallwood's testimony was there. The effect of Mr. Smallwood's testimony was not to establish, I would submit, that Gray murdered McClelland. Again if one accepted the credibility of the witnesses, and attached weight to their [35] testimony, and reviewed the exhibits,

it was not necessary even to consider Smallwood's testimony to establish guilt beyond a reasonable doubt.

What Smallwood's testimony did, however, Your Honor, is plant the seeds in the guilt phase for the sentencing phase. And that was to establish Gray not just as a killer – and I'm speaking from the standpoint of taking this testimony in the light most favorable to the Commonwealth. The effect of Smallwood's testimony was not to establish Gray as a mere murderer, but to establish him as a cold blooded, remorseless murderer, of the sort that again if one took the law in the light most favorable to the Commonwealth, one that deserved the death penalty. And yet this was not the sentencing phase in which Smallwood's testimony was offered.

The effect of that, I would submit, is to enflame the jury, to lead them to go beyond what they were there for at that particular phase, and it was grossly prejudicial to Gray to have this testimony introduced.

Now we get to the "what if". How do we know that Smallwood's testimony did this. I can only say, Your Honor, that in – that my understanding of the trial of this case and what went on in the courtroom, [36] what was the significance of Smallwood's testimony, did it really do this, I would submit that it may well indeed be that there can be evidence introduced that Smallwood's testimony was the single most riveting part of the trial of this case in the guilt phase. It grabbed everybody's attention. And because number one, he was a compelling witness, he was – had a certain amount of charisma, and it may well be established that at the time of his testimony and what he says was electrifying in the courtroom. And indeed if

that is the case, it would have carried over not just to determine guilt, but to inflame the jury and have their minds on capital punishment when they were simply to determine guilt or innocence.

And then compounded by the fact that Smallwood has, under oath by affidavit, recanted this testimony and stated that it was false. That establishes in itself, Your Honor, that this case could well have turned on inflammatory or perjured testimony. Not just unnecessary perjured testimony, but unnecessary perjured testimony that went to inflame the jury and carry them beyond what was their duty at that particular time.

Again it's not the fact that Smallwood's perjured himself in saying that Gray admitted being a [37] murderer. It's the manner in which Smallwood inflamed the jury through his unnecessary testimony.

And Your Honor, that seems to me that this is – that is one of the most compelling legal reasons to grant a writ of habeas corpus in this particular case. And that there can be evidence adduced at an evidentiary hearing on this petition to establish the effect in the courtroom and the effect, the likely effect on the jury, that Mr. Smallwood's perjured testimony had. And if that were indeed the case, if his perjured testimony had this effect on the jury, or even likely could have had this effect on the jury, then Mr. Gray's – then the jury's finding of guilt would certainly seem, it seems to me, to be defective.

Now the second most – again from a reading of the record in this case, the second most electrifying phase of this trial, I would suggest – and when I say electrifying, I'm not using the term lightly – one that had an impact on

those in the courtroom and most certainly had an impact on the jury, is the introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake. In essence what the Commonwealth did in order to prove that Gray was – had future dangerousness and [38] presumptive, I guess, vileness under the law, is to prove that Gray committed another murder in another jurisdiction for which he was never charged and never brought to trial.

Now in this particular case, there are – Well, there is precedent that evidence of other crimes can be used in a sentencing proceeding. And there are cases where the Supreme Court on capital cases has held that you can have direct evidence of other crimes committed by the defendant. And I've recited them in my petition. But in every one of those cases, Your Honor, I would submit that there is direct evidence that the capital murder defendant committed those other crimes. There is either eye witness testimony – I saw him do that, commit that crime – or you have statements, admissions made, that the defendant, the capital murder defendant, himself confessed to those crimes. We don't have that in this case. We simply have, in essence, the Commonwealth attempting to prove by exhibits and by a statement by another fellow, that he heard Gray say he did it, to prove a murder in another jurisdiction.

Now, the supposed confession of Gray to the Sorrell murders is in a statement testified to by co-defendant Melvin Tucker. Gray told me in essence, [39] in short, that he committed the Sorrell murders.

Well, if this was an independent witness with no ties to this particular case, whose credibility was not tarnished in this case by bias, perhaps that would have some weight. But the one person who could tie Coleman Gray in this particular case is Melvin Tucker, who had already been given a plea agreement with the Commonwealth. His capital murder charge had been reduced to first degree murder, Tucker was going to have life imprisonment, and there you have – excuse me, I'm not sure about life imprisonment. Tucker had a sentence other than death. He had every incentive to help the Commonwealth, and the nature of his testimony is that of a biased person. But Tucker's testimony is the only direct evidence in this case that could link Coleman Gray to the Sorrell murders, other than sheer coincidence. And that is the inflammatory nature.

The cases, the law in Virginia and the cases that allow introduction of other, evidence of other crimes, deal with direct evidence in terms of eye witnesses or confessions, and I would submit that a confession by Tucker simply carries it beyond the pale.

And Your Honor, that in itself, this – the [40] Sorrell case, the introduction of that evidence, from the Sorrell case in Chesapeake, was just simply – You know, to say it was unfairly prejudicial to Mr. Gray I would submit is an understatement, and I won't comment beyond that further. But those two grounds, Your Honor, I would suggest are legal claims that certainly require those – a petition for – require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain

their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COLEMAN WAYNE GRAY,

Petitioner,

v.

CHARLES E. THOMPSON, Warden,

Respondent.

FINAL ORDER

Upon mature consideration of the pleadings and exhibits filed herein, and the arguments of counsel, and for the reasons more fully stated in the written Opinion of this Court entered of record on April 12, 1990, the Court is of the opinion that the petitioner is not entitled to the relief sought.

The Court finds that petitioner's arguments numbered I, II, V, VI, IX, XI, XIII, XVI, and XIX were decided adversely to him at trial and on direct appeal, and are thus procedurally barred under the rules of *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969), and *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970).

The Court further finds that petitioner's arguments numbered III, IV, VIII, X, XII, XIV, XVII, and XX could have been raised at trial and on appeal, but were not, and are thus procedurally barred from consideration in habeas corpus proceedings under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243.

The Court further finds that petitioner's argument VII is not cognizable in habeas corpus proceedings, in accordance with the rules of *Virginia Department of Corrections v. Crowley*, 227 Va. 254, 316 S.E.2d 439 (1984), and *Fitzgerald v. Bass*, 6 Va. App. 38, 46, 366 S.E.2d 615, 620 (1988), and is meritless for the reasons indicated in respondent's Motion to Dismiss.

The Court further finds that petitioner's claim XV alleging ineffective assistance of counsel does not entitle him to habeas corpus relief in that subclaims (a), (b), (c), and (k) fail to allege facts sufficient to establish errors and omissions on the part of defense counsel, or to establish that petitioner has been prejudiced thereby, and in that subclaims (d), (e), (f), (g), (h), (i), (j), (l), (m), (n), and (o) are meritless, all for the reasons more fully stated in the Opinion of this Court entered April 12, 1990.

The Court further finds that petitioner's claim XVIII is meritless, for the reasons indicated in respondent's Motion to Dismiss.

WHEREFORE, the Court hereby denies the motion for a plenary hearing and dismisses the petition for a writ of habeas corpus.

Entered this 14th day of May, 1990.

/s/ James C. Godwin
James C. Godwin, Judge

We ask for this:

/s/ John H. McLees, Jr.
John H. McLees, Jr.

Seen and objection noted:

/s/ Rodham T. Delk, Jr.
Rodham T. Delk, Jr., Esquire

CIRCUIT COURT CLERK'S OFFICE
Suffolk, Virginia

A TRUE COPY TESTE:

HENRY C. MURDEN, CLERK

By: /s/ IllegibleD.C.

In the Supreme Court of Virginia

[Caption Omitted In Printing]

* * *

IV. The Trial Court Erred in Dismissing Gray's Claim VII As Not Cognizable in Habeas Corpus Proceedings and Without Merit.

This claim involved the use of perjured testimony of Jeremiah Smallwood (J.A. 850-864) by the Commonwealth. Gray does not take issue with the case law which generally holds that after-discovered perjury is not a matter for habeas corpus unless the perjured testimony was knowingly used by the prosecution. *Fitzgerald v. Bass*, 6 Va.App. 38, 46, 366 S.E.2d 615, 620 (1988); *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir.), *cert. den.* 423 U.S. 933, 96 S.Ct. 287 (1975).

In the case at hand, however, the trial judge dismissed Gray's claim *as a matter of law*, without any opportunity on the part of Gray to substantiate his claim by evidence or have a reasonable opportunity to inquire into the issue of knowing use of perjured testimony by the prosecutor.

Gray's claim is cognizable in habeas corpus and the trial judge's dismissal of the claim as a matter of law was error.

V. The Trial Court Erred in Dismissing Gray's Claim XV, Alleging Ineffective Assistance of Counsel, Without a Plenary Hearing in Order to Afford Gray the Opportunity to Present Evidence in Support of His Claim.

A presumption exists that trial counsel performed in an effective and proper manner. *Strickland v. Washington*, 466 U.S. 668, 693-695, 104 S.Ct. 2052, 2067-2069, (1984), and the burden of establishing that the trial defendant was denied effective assistance of counsel is on the trial defendant. *Stokes v. Warden*, 226 Va. 111, 118, 306 S.E.2d 882, 885 (1983). Obviously, therefore, it follows that evidence must be presented by Gray in order to meet his burden in this case. The Trial Court, however, in denying Gray a plenary hearing on the issue, also effectively denied Gray the only means of meeting his burden and attacking the issue.

If the right to effective assistance of counsel is to mean anything, then defendants must be given full opportunities to meet the burden of proof imposed upon them, and that burden cannot be met at the outset merely by words written in the Petition for Habeas Corpus.

The Trial Court erred in denying Gray a plenary hearing.

VI. The Trial Court Erred in Dismissing Parts (a), (e), (f), (g), (h), (i), (j), (l), (m), (n) and (o) of Gray's Claim XV as Meritless as a Matter of Law.

In dismissing those claims (relating to the effectiveness of assistance of counsel) as meritless, the Trial Court simply held, in effect, that no amount of evidence in a

plenary hearing would establish the claims by the burden of proof imposed on Gray. The Trial Court simply prejudged the issues, without hearing any evidence in the form of competent expert testimony, and thereby was in error in denying Gray a plenary hearing.

VII. The Trial Court Erred in Dismissing Gray's Claim XVIII as Meritless, as a Matter of Law.

Counsel declines to elaborate on this question, except to respectfully urge this Court, when engaging in proportionality review, to also compare death sentences in cases under review with life sentences imposed on other capital defendants and with sentences imposed upon noncapital homicide defendants, in light of the facts and circumstances in each case in order to fully insure that capital punishment is meted out only after a truly full proportionability review.

VIII. The Court Should Reexamine Ruling in *Gray v. Commonwealth*, 223 Va. 313, 356 S.E.2d 157 (1987), at It Relates to Gray's Claim IX and the Sorrell Murders.

Gregg v. Georgia, 425 U.S. 153, 96 S.Ct. 2909 (1976), wherein the Supreme Court held it to be "desirable for the jury to have as much information before it as possible when it makes the sentencing decision, "428 U.S. at 204, 96 S.Ct. at 2939, did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case.

In deciding this issue on Gray's direct appeal, *Gray v. Commonwealth, supra,* this Court relied upon *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. den.* 445 U.S. 972, 100 S.Ct. 1666 (1980), and *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982), *cert. den.* 460 U.S. 1029, 103 S.Ct. 1280 (1983), for support of the use of evidence of other crimes in the penalty phase. *Watkins*, however, is inapposite, in that Watkins was already charged and indicted for the other offenses referred to. Other cases cited in *Watkins* involved uncharged crimes which the defendant had admitted committing, or which involved *direct* evidence that the crimes were committed by the defendant. See *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985), *cert. den.* 474 U.S. 865, 106 S.Ct. 189 (1985), where Poyner himself confessed to other crimes; *Stamper, supra,* where the victim of another crime by Stamper testified; and *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984), *cert. den.* 469 U.S. 873, 105 S.Ct. 229 (1984), involving eyewitness testimony of another murder.

Only *Quintana, supra,* stands for the use of evidence of other uncharged crimes to which the defendant had not admitted and which did not involve direct evidence. In *Quintana,* witnesses testified as to admissions by the defendant of uncharged crimes in other jurisdictions. These witnesses were not, however, co-defendants of Quintana testifying under plea agreement, as was Tucker in the present case.

In this case, the only direct evidence linking Gray to the Sorrell murders was that of Melvin Tucker, a convicted felon and a co-defendant testifying under a promise of leniency – testimony which should be considered inherently unreliable. The use of this kind of evidence simply goes beyond the pale established by the existing case law, and in itself was fundamentally unfair and prejudicial to Gray.

The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproven offense which occurred in Chesapeake, by the use of what amounts to *no reasonable standard of proof*. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense for Gray to such testimony would be either the requirement of proof beyond a reasonable doubt or innocence to be proved. The first was not achieved and the second would be impossible anyway, and in fact no amount of preparation time on the part of defense counsel would have been adequate. This is where another fundamental violation of Gray's right to due process occurred.

Gray is mindful of this Court's prior ruling in his own direct appeal. *Gray*, supra. A reading of the briefs in that appeal, however, shows a different treatment of the issues involved in this question than is argued here and Gray urges this Court to reexamine its prior ruling accordingly.

CONCLUSION

For the reasons shown, the Trial Court committed reversible error in entering the order dated May 14, 1990, dismissing Gray's Petition for Habeas Corpus, and Gray prays that he be awarded an appeal to this Court.

In the Supreme Court of Virginia

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of January, 1991.

Coleman Wayne Gray, Appellant,

against Record No. 901117
Circuit Court No. L88000275-L-5759

Charles E. Thompson, Warden, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on November 1, 1990 and grant a rehearing thereof, it is ordered that a rehearing be granted, the said judgment refusing the petition for appeal be reversed and set aside, and the following judgment be entered in lieu thereof:

From the circuit court of the City of Suffolk

The Court has reviewed the record in this case and considered the argument submitted in support of and in opposition to the granted of an appeal.

Applying the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to Question Presented No. 2 (Claims I, II, V, VI, IX, XI, XIII, XVI and XIX); the rule in *Slayton v. Parrigan*, 215 Va. 27, 207 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), to Question Presented No. 3 (Claims III, IV, VIII, X, XII, XIV, XVII, and XX); the rule in *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600 (1948), to Question presented No. 5 (Claim XV, subclaims (a), (b), and (c) and

(k)), the Court refuses these claims for reasons of procedural default. *Harris v. Reed*, 489 U.S. 255 (1989).

All remaining Questions Presented are refused on the merits. Accordingly, the petition for appeal is refused.

The said circuit court shall allow court-appointed counsel the fee of $300 and also his costs and necessary direct out-of-pocket expenses.

A Copy,

Teste:

/s/ Illegible
Clerk

In the United States District Court
for the Eastern District of Virginia

[Caption Omitted In Printing]

* * *

[32] BY MR. TURNER:

Q Was this order signed by Judge Godwin, Mr. Moore?

A Appears to be, yes. That's his signature.

Q Is this what you would call a discovery order in a criminal case, is that the proper terminology?

A Yes.

Q Is this as broad an order as you are aware that you are entitled to in a criminal case in the State of Virginia?

A At the time, it was as broad as we could get, yes.

Q By the time, you are referring to 1985?

A That's correct.

Q Are you familiar with the BRADY v. MARYLAND case, sir?

A Like I said, I haven't practiced criminal law in ten years or nine years since the end of this case. So I can't give you a summary of that law at this time. I might have been able to at that time.

Q I notice there are four words crossed out on page three of this order, which is Exhibit 12. Can you tell us the history of that, if you recall, sir?

[33] A Well, that's obviously Judge Godwin who marked that out when he entered the order. And the difference in that is that normally, witnesses are sworn in in this Suffolk Circuit Court prior to their being excluded from the courtroom. And what the practical effect of this is is that we were not given any evidence as to what the witnesses were going to testify to until they took the witness stand. Otherwise, if those words were not scratched out, we would have had to have been provided with the same information on the morning of the day they were going to testify. A very significant scratching, I can assure you.

Q You say it is significant?

A Yes, it is.

Q In what sense?

A What happened here was that when the witnesses took the witness stand, literally as they were walking up and being sworn in, the Commonwealth's Attorney was handing us the statements that were going to be referred to by the witness. What Mr. Eason and I had to do, one person tried to listen to what the person was testifying to and the other attorney was reading the exculpatory evidence as it was given to us on the spot. So one attorney was [34] trying to pay attention to what was going on with the witness, the other attorney – what it basically did was rendered the order useless. It had no benefit to us at all. Might as well not even have been granted.

Q Looking back at the order, which is Exhibit 12, just one item I would like to highlight. I passed by it. It is

on page two, little D, about maybe 50 percent, 60 percent down the page. You see little D. Starts out all evidence in the Commonwealth's possession?

A Right. I've got it.

Q I think that relates back to the – actually, it relates back to the two-line order from the first page, and I'll just read it to move things along, where the order says it is ordered that the defendant, Coleman Wayne Gray, be permitted to inspect and copy the following: And then there are various items listed. I'm focusing on D on page two. Would you please read that into the record?

A Statements of prosecution witnesses.

Q Do you see language in there speaking of evidence in the Commonwealth's possession which is exculpatory to the defendant on the issue of guilt or punishment?

[35] A Right.

Q Was it your understanding that you were entitled to such evidence under this order?

A That is correct. And then the Judge basically, when Phil Ferguson would give us the statements as the person was taking the witness stand, I surmise the Judge thought he was complying with it at that time. Practically, it was not as much use to us as it would have been if we had had the statements earlier.

Q Obviously it wouldn't be of any use to you if you didn't have them at all, would it?

A Right.

Q I notice it references guilt or punishment. In speaking of punishment in the context of the McClelland case, what are we talking about, sir?

A Punishment means the penalty stage of the trial. It is a bifurcated trial. There is an evidentiary – the guilt phase, and then there is the penalty phase, which are two distinct hearings, trials.

Q From a temporal point of view, did they run consecutively at the same time?

A No, they didn't.

Q Can you just give me an overview of the days of [36] the trial, if you recall that?

A The trial started Monday morning, I believe it was December 2nd. That's the guilt trial. And that lasted well into Thursday of that week, concluded at that time with a guilty verdict of capital murder. And then the penalty trial commenced Friday morning of that week.

Q Does the same jury hear both?

A Same jury.

Q So the time between the end of the guilt phase and the beginning of the penalty phase was just one evening?

A One evening.

Q So your client has just been convicted of capital murder excuse me, yes, has just been convicted of capital murder and then you have got to prepare to deal with the sentencing phase the next morning; is that right?

A The very next morning. One evening we had. Unless one were to assume that he was going to be found guilty all along. But then again, we didn't get any of the evidence from the Commonwealth's Attorney until that evening or maybe even Friday morning. Thursday evening or Friday morning.

Q I'd like to take you back, sir, to the morning [37] of Monday, December 2nd, 1985. Do you remember where you were that day?

A Certainly. I was in Suffolk Circuit Court.

Q Who was with you that morning?

A Co-counsel, Ward Eason, and of course Mr. Gray was there.

Q Judge Godwin, I take it, was there?

A Judge Godwin, Phil Ferguson and his staff, right.

Q Did you have a meeting with the Judge prior to the trial starting?

A Certainly did. This was in chambers. The record unfortunately doesn't reveal what was in chambers and what was not. That's a very subtle difference because anything we didn't want the press or maybe the jury or anybody in the courtroom to hear, we went in chambers with the court reporter and I had an in-chambers motion. An in-chambers motion was for the Commonwealth's Attorney to advise us that morning of any evidence that it intended to adduce during the penalty trial if there was going to be one. I think we argued that on the basis of the Virginia PETERSON case which held that it was preferred

practice for the Commonwealth's Attorney to give evidence that it intended to adduce during the [38] penalty trial to the defense counsel at the beginning of trial. So I asked for it Monday morning.

Q What was the response?

A Well, I got some real stonewall from the Commonwealth's Attorney. He said he didn't want to do it and we had to press him for it. Finally, Judge Godwin ordered that he give us the evidence. And I wanted to know what the evidence was and what was told to me Monday morning, what was told to me Monday morning was that the evidence that would be adduced would be statements that Coleman Gray made to other individuals regarding other crimes he had committed. As the Court could see from my – and the record pretty much speaks for itself – I wanted to find out whether or not the Commonwealth intended to introduce any evidence whatsoever that Coleman Gray had committed the Sorrell murders. And I tried to put the Commonwealth's Attorney in the corner on that. And I think the record will show that he said, "Yes, I'm going to introduce statements that he made to other people, that he had committed those crimes. That crime and other murders." But he said statements that Coleman Gray made.

Q Did he indicate anything else, sir?

A Not at that time, he didn't, no. I found out [39] later that he was going to try the Sorrell murder case on Friday. I didn't find that out until Thursday afternoon.

MR. McLEES: I object to the witness' conclusion that he is trying the case.

THE COURT: Overruled.

BY MR. TURNER:

Q The discussion that you have just testified to took place on the early morning of December 2nd; is that correct?

A That's correct.

Q When did the trial start?

A That very morning. Voir dire commenced that morning.

Q We are talking about the McClelland murder trial?

A That's right.

Q It was a capital murder case.

A That's correct.

Q Was there any sort of publicity at that point about that case?

A Oh, it was definitely publicized. The press was there, newspapers were there, TV reporters were there. It was highly publicized and got coverage in the evening TV news every day of the entire trial, [40] I'm pretty sure. Even though I don't think I watched it real carefully.

Q In general, without getting into a lot of detail, between the morning of December 2nd, 1985 and the end of the guilt phase of the trial, what generally transpired that you recall this morning?

A Well, there were two of us without an investigator, and we were heavily engaged in the active defense of

the guilt trial, guilt phase of the trial. The evidentiary proceeding itself. When I mean by that, we would find out on a daily basis who the witnesses would be, and of course you have to react to the day's testimony. You have to anticipate the next day's testimony. And we were conducting, even during that week, we were preparing, we worked every night trying to prepare for the next day and trying to get ready for the next day of the guilt trial. We would find out that the Commonwealth was going to call certain witnesses. We would go interview them, a couple in particular, and of course we had to get together every night to prepare for the next day. I say every night, I assume I did.

Q Did you have a lot of spare time that week?

A No. You know, different people react differently to trial work. A 5-day trial is an [41] extremely physically and mentally exhausting thing for anybody and it was for me. I'm exhausted physically and mentally after one day of active trial work. So to go for 5 consecutive days was similar to running a marathon to me.

Q I take it there came a time when the guilt phase of the McClelland trial ended; is that correct?

A That guilt phase ended on Thursday. It was probably in the afternoon. Probably.

Q What date would that be, if you recall, sir?

A The 6th.

Q That's December 5th, 1985?

A That's correct.

Q When was the penalty phase to begin?

A The 6th

Q I'd like to now take you back to the morning of December 6th, 1985. Do you remember that morning, sir?

A Very well.

Q Was that a Friday?

A Yes, it was.

Q What happened that morning with respect to the Sorrell matter, if anything?

A Well, we had found out, and I don't know how we had found it out, maybe Phil Ferguson told me [42] Thursday evening, that he intended to introduce not only what he told me he was going to introduce on Monday morning when he said he was going to introduce statements made by Gray, but he was also going to input color photographs, bring the investigator and Medical Examiner down to, in essence, try the Sorrell murders.

Q How did you react to that, sir?

A It blew me completely away. And is blowing me eight-and-a-half, almost nine years later, and it still blows me away. It is unbelievable. It is incredible.

Q What did you do in response?

A I went back and read that Thursday evening, when I found out what he was going to do the next day, I read all the applicable Virginia law that I could find to try to see how I could make an argument the very next morning to show that this just simply couldn't happen

and hope that we could get upheld on appeal. That's the only thing we could do. We found the WATKINS case, a Virginia Supreme Court case, which I remember permitted this type of evidence to be adduced during the penalty stage without the necessity of a conviction. We went back and distinguished, I thought very clearly, the WATKINS [43] case and the present case. The WATKINS case, which is a Virginia Supreme Court case, did permit the Commonwealth to put in evidence of another murder or crime without a defendant being convicted, but in that particular case, the defendant was represented in the other crime, which evidence was being admitted, by the same attorneys and had been for quite some while, had been represented by those attorneys during the preliminary hearing phase, and so they were actively engaged in the representation of that defendant. And therefore, any evidence we felt – we felt any evidence that may be adduced during the penalty phase in WATKINS could be easily distinguished in our case, because Coleman Gray had not even been arrested for the thing, much less gone to a preliminary hearing, which is for a defense counsel in Suffolk the only place you can do any real investigation is the preliminary hearing when they put the evidence on. You take it from there and run. He hadn't had a preliminary hearing, hadn't been indicted, arrested, nothing. We felt we would show that to Judge Godwin, put it on the record and certainly the Supreme Court of Virginia was not going to allow this to happen. That they couldn't put the evidence of another gruesome, highly publicized [44] murder in the record, it certainly couldn't happen. Certainly it would be overturned by the Virginia Supreme Court. I argued the next morning just that, that this case

was distinguished from the WATKINS case, and on the very basis of what I just said. I might not have said it as long as I did just then, but that's what I told the Judge.

Q What position did Mr. Ferguson the prosecutor take?

A He said he could do it. He said he could put evidence of another crime even though the defendant had not been convicted of it. Because of WATKINS again, that's true. WATKINS held that the defendant did not have to be convicted of those crimes. But maybe that's bad law, maybe it has been codified. I think it has, probably, by the Virginia statutes now. But still, it is highly distinguished from our case. The man hadn't been charged. To my knowledge, he still hasn't been charged. Eight years later he hasn't been charged with it.

Q The morning of December 6th, 1985, were you prepared to defend the Sorrell murders?

A Absolutely not.

Q Did you advise the Judge of that?

A I sure did.

[45] Q What did the Judge – how did he react to this?

A He said, "Well, we have got to go by case law. And the case law is WATKINS. WATKINS says it can come in."

Q Just in general, I don't mean to get a lot of detail, what is the Sorrell murders? We have heard that term a lot.

A The Sorrell murders were much more highly publicized to my recollection than McClelland because it involved the murder of a mother and a three-year-old girl. I remember seeing on TV all I knew about the Sorrell murders is what I saw on TV. It was highly publicized for a good deal of time. It was well-known that the Sorrell mother and child were abducted or taken from Greenbriar Mall, taken somewhere in the woods and shot. The mother was shot and I'm not sure whether the newscaster said whether or not the three-year-old baby girl was shot or how she died. And then there was I remember seeing, just remember it from ten years ago, seeing Dick Brydges, a defense counsel in Virginia Beach, walking beside Timothy Sorrell, who was a prime suspect. He may have been arrested in the case. And then I remember that the newspaper people said that Timothy Sorrell was no longer a suspect and that was the end [46] of the case as far as I knew. That's the last I remember of it. But it was a highly publicized case. I cannot remember another one being as highly publicized.

Q When you refer to Timothy Sorrell not being a suspect, do you recall when you heard that?

A No.

Q Could have been after the McClelland trial?

A Could have been. I just remember he was on TV walking beside Dick Brydges. I don't remember if that was before or after the McClelland trial. I wouldn't bet money on whether it was before or after.

Q I take it the penalty phase then proceeded forward?

A It did.

Q Was there any evidence introduced concerning the Sorrell murders?

A Yes, there was. If I remember correctly, I have gone through the record recently, portions of it, Melvin Tucker, who was the co-defendant, took the stand and testified that Coleman Wayne Gray had him at some point in time that he had killed the Sorrells. And so not to worry about this. And based on that statement by Melvin Tucker, who is a [47] co-defendant, the Judge allowed this other evidence in the trial to go forth with respect to the Sorrell murders.

Q Had you seen any such statement by Mr. Tucker prior to the morning of December 6th, 1985?

A No.

Q Do you understand that there was a written statement by Mr. Tucker?

A No.

Q Okay.

A We had not been allowed to talk to Mr. Tucker.

Q Why was that?

A Because defense counsel wouldn't allow him to talk to us.

Q Did you specifically ask to?

A Sure, right at the very beginning we did. If I may, Your Honor, it is important for this Court to know that the record will show that Mr. Ferguson put in the pictures

and Detective Slezak for the purpose of showing that the crime was committed. The record will show that. That may be what Mr. Ferguson tells you tomorrow. But what happened was, the similarities between the McClelland murder and the Sorrell murder would be obvious to anyone sitting in a jury box. So what was permitted was an actual [48] trial and conviction of Coleman Gray in the Sorrell murder. Absolute conviction.

MR. McLEES: Judge, I object to this witness speculating about what the jury's conclusion or thought process was.

THE COURT: Sustained. Go ahead and ask a question.

MR. McLEES: I would move to strike that question and response.

THE COURT: No need for that. I heard it and I'll be the one to resolve it. Go ahead.

MR. TURNER: Your Honor, Exhibit 10 is in. It includes the exhibits presented on the Sorrell murders in the trial. There are a number of color photos in there that I would ask the Court to please take a look at. The exhibits are 45 through 56. They are my Exhibit 10, but in the box, there is a folder with all those exhibits and they are 45 through 56.

THE COURT: All right.

MR. TURNER: A number of them are the color photographs, I believe you will see.

BY MR. TURNER:

Q Was there any medical testimony at the penalty phase concerning the Sorrell matter?

[49] A Oh, sure. Same person. I'm sure that Dr. Pressawalla testified, showed that the bullet wounds in the head of Lisa Sorrell would be basically the same pattern as the bullet holes in the head of McClelland, shaved her head, put the color photograph of that in.

Q Who is Pressawalla?

A The Medical Examiner for the Commonwealth of Virginia, or a Medical Examiner for the Commonwealth.

Q Did he testify at the McClelland penalty phase?

A It is my recollection that he did.

Q Did he testify about the McClelland murders?

A I'm not sure if he did or someone else did. But the McClelland murder had color photographs of the bullet wounds in his head and exit in the face. Sorrell photographs had entry wounds in the head, exit in the face.

Q Dr. Pressawalla testified about the Sorrell murders; is that correct?

A Yes, he did.

Q Did a man named Michael Slezak testify in the penalty phase in the McClelland trial?

A Yes. To my recollection he was one of the chief investigators, detectives, with respect to the [50] Sorrell Murder.

Q Did you note an objection to the entire procedure dealing with the Sorrell murders on December 6th, 1985?

A Again and again, every time I had a chance.

Q When Melvin Tucker testified on December 6th, 1985, do you remember that, sir?

A Yes, I do.

Q When he walked up and sat down in that witness stand, did you have any knowledge at all that he would testify concerning the Sorrell murders?

A Not that I can recollect, no.

Q Do you recall cross-examination of any of the witnesses presented on the Sorrell murder?

A The only recollection I have of any cross-examination was reviewing the record. I don't really remember any of it.

Q Do you remember if you asked Mr. Tucker any questions?

A No. A trial lawyer doesn't ask a question of a defendant – I mean of a witness unless you had some reasonable idea what the answer is going to be.

Q Do you have any recollection of something coming up about a murder in California?

A Yes. Yes, I think that there was a witness in [51] the evidentiary trial that testified –

MR. McLEES: Excuse me, Your Honor. I object to this. The issue identified by Your Honor in the order that generated this hearing addressed the allegations concerning the Sorrell murders. This California stuff has

nothing at all to do with the Sorrell murder. This is not part of what is before the Court today.

MR. TURNER: My only purpose is that one of our exhibits is that Mr. Gray had been acquitted of murder in California. I am trying to introduce it as background to what was really going on here and to the general way of operating of the Commonwealth's Attorney in this context, which is most pertinent to the Sorrell matter, but I think it is important that the Court should know that this was happening in a little larger context, the same sort of characteristics were cropping up with other matters.

THE COURT: The objection is sustained.

BY MR. TURNER:

Q What was the result of the penalty phase of the McClelland trial?

A He was sentenced to die in the electric chair. Coleman Wayne Gray was.

Q Did there come a time when you were before Judge [52] Godwin again on the case?

A Yes. We argued it for him to set it aside. I'm pretty sure we argued the same points with respect to the Sorrell murders, the permission, the allowing of that evidence in, as inflaming the jury and as being contrary to due process and asked for him to set it aside on those bases, probably among others. Quite frankly, I have not reviewed the transcript of my argument before Judge Godwin. I don't purely recollect it from nine years ago.

Q Am I correct that in Virginia, the trial judge is the final say, so to speak, as to the sentence?

A I certainly believed in the argument before him that he had the right to set it aside at that time.

Q Did you ask him to do that?

A I believe so.

Q And the Sorrell matter was part of your request?

A Yes.

Q What was his answer?

A He said he had already ruled on it. I'm pretty sure that was being said for the record, he told me later. It was permissible evidence. He refused to set it aside.

Q Did Mr. Ferguson, the prosecutor, ever present [53] to you any materials that would suggest that Mr. Gray was not involved in the Sorrell murders?

A No.

MR. TURNER: That's all I've got, Your Honor.

THE COURT: All right. Mr. McLees?

CROSS-EXAMINATION

BY MR. McLEES:

Q Mr. Moore, you mentioned on your direct examination that you argued to Judge Godwin to set aside the verdict sentencing Mr. Gray to death. When was that, sir? Do you recall?

A It would have been 30 or 60 days subsequent to the trial. January or February of 1986.

Q Mr. Gray's actual sentencing by Judge Godwin took place in February of 1986, did it not?

A All right. Really, I'm not trying to be coy. If you say it was, the record will reflect when it happened.

Q Of course. And of course, even if you are not still involved in criminal law, you are familiar with the principle of Virginia law that a judgment doesn't become final until 21 days after it is entered?

A That's right.

Q It can be vacated or modified or set aside in [54] any way up until that point, can't it?

A Sure.

Q So any time in the approximately two months between the jury trial and the actual sentencing hearing, Judge Godwin could have vacated that sentence and given Mr. Gray a new trial.

A Well, of course.

Q Any time after sentencing and after the sentencing order was entered, within 21 days after that order was entered he could have done the same thing, couldn't he?

A Sure.

Q Now, you mentioned that the Sorrell murders were extremely, highly publicized. You said you had read about them in the paper and seen them on the TV and seen Mr. Brydges with Timothy Sorrell. Do you remember reading in the paper or hearing in the news about a

lawsuit involving the Sorrell victims' parents, Lisa Sorrell's parents, trying to prohibit Lisa Sorrell's husband from getting the proceeds of a life insurance policy?

A No.

Q You didn't read or hear about that?

A No.

Q I see. Okay. Now, between the trial, the jury [55] trial and the sentencing hearing, or within 21 days after the sentencing hearing, did you contact Lisa Sorrell's parents?

A I can't remember.

Q You have no recollection of doing so, I gather?

A No.

Q Did you contact the Chesapeake Police Department?

A I had already talked to Detective Slezak at the time the jury was – in the detective room. At that time. I knew what he thought.

Q Did you ask him why Timothy Sorrell had been a suspect?

A No. All I remember getting out of Detective Slezak was that he was angry with the prosecuting attorney in Chesapeake. He said they had screwed the case up. He was also angry with them because they wouldn't go forward with anything else in the prosecution with Coleman Gray. He had several theories.

Q Excuse me, my question was, did you ask Detective Slezak why Timothy Sorrell had been a suspect? I take it your answer to that is no?

A No.

Q Thank you. Did you demand of Mr. Ferguson to [56] produce whatever information it is that caused Timothy Sorrell to be regarded as a suspect?

A No.

Q Did you ask Judge Godwin formally or informally to order that you be given material from the Sorrell investigation that caused them to regard Timothy Sorrell as a suspect?

A No.

Q Did you investigate the Sorrell murders in any way?

A No.

Q During that period of time?

A No. I already told you we didn't have an investigator. I have already testified to that.

Q You had accepted criminal cases on a court-appointed basis before this capital murder case, surely.

A Sure.

Q Could you respond verbally for the record?

A Yes, I have. Hundreds of them.

Q Surely some of them were serious cases?

A Of course.

Q They wouldn't appoint you to this without that kind of experience, would they?

A No.

[57] Q And your experience, I take it, was that investigators are not frequently appointed to assist counsel with court-appointed cases, are they?

A I had never known of one to be appointed.

Q In fact, you usually wind up doing your own investigation, don't you?

A To the extent you do it.

Q Making telephone calls and making Court motions and contacting detectives is not unusual work for criminal defense lawyers even when they are assisted by investigators, is it?

A No. Come to think of it, we tried Detective Slezak Thursday night before Friday. I do remember that. Talked to him on the phone. Mr. Eason and I did. Mr. Eason may remember this better, but we might have talked to the Sorrell mother. I'm not sure. The mother of Lisa. I'm not sure about that. But we did some. But you have got to understand, the Court has to understand that you may object to the word, but Coleman Gray was tried and convicted of the Sorrell murders, which means he didn't get a presumption of innocence. So are you inferring to me we should then prove his innocence after he had already been convicted of guilt?

Q Mr. Moore, one of the few advantages of being in [58] my position is that I get to ask the questions. But as a

matter of fact, sir, anything that was decided at Coleman Gray's jury trial was under Virginia law subject to being set aside by Judge Godwin had you at that point demonstrated a constitutional violation, wasn't it?

A That's correct.

Q Okay. And your testimony, as I understand it, is when you made your motion for a new trial, what you argued was the same thing that you had argued at the jury trial before this evidence was put on?

A Exactly. It has nothing to do with the guilt or innocence. You asked the question. It had nothing to do with the guilt or innocence of Wayne Gray of the Sorrells. It simply had to do with permissibility of the evidence that was put on. I was not then concerned whether or not he had done it. I am not now concerned whether he did it. I am concerned as to what was allowed to happen on December 6th in Suffolk Circuit Court.

Q And you didn't make any inquiry that you can recall into whether there was evidence in the possession of any of the Commonwealth authorities, Chesapeake or Suffolk, incriminating Timothy Sorrell as opposed to Coleman Gray?

[59] A I guess I'm just not that smart.

Q Had you done so, we could have been litigating this claim in January of 1986 rather than in April of 1994, nine years later, couldn't we?

A Absolutely not.

Q Now, this evidence that Mr. Ferguson told you he would present, that Mr. Gray made statements to other

prisoners that he had committed the Sorrell murders, did that take you by surprise?

A Excuse me?

Q Did that take you by surprise, when he told you that?

A When who told me what?

Q When Mr. Ferguson told you he was going to present evidence of that sort.

A No, we were asking him for that evidence on Monday morning. We had learned that that may be a possibility.

Q When had you learned that, sir?

A The Friday night before the trial.

Q How had you learned that, sir?

A We had obtained a witness list of the Commonwealth's witnesses and gone and interviewed all of them that would talk to us.

Q And of course as you mentioned before, it was [60] Mr. Tucker's attorney who prohibited you from speaking to Mr. Tucker, not the Commonwealth's Attorney.

A Couldn't talk to Tucker, that's right. Andrew Sacks wouldn't let us do it.

Q Did you ask Mr. Gray about statements to – pertaining to the Sorrell murders?

A Yes.

Q What did he tell you?

A He said that – well, put it back in context. We interviewed the witnesses and then went to see Friday night before the trial, to see Gray. We got list on Friday showing a Keith Godwin on there, on the prosecutor's witness list. And I think I didn't have – I was in a conflict with time so I think Ward went down to see him in jail. He was in lock up in Suffolk Circuit Court. And based upon what Ward found out from him we went over to see Wayne Gray that night. Godwin wouldn't talk to us. He said he was represented by Frank Rawls, basically said that he hadn't cut a good enough deal with Ferguson yet to testify against Gray.

Q Mr. Godwin was one of the witnesses as well?

A That's correct.

Q Go ahead.

[61] A I think Wayne Gray told us that night that he had heard that Keith Godwin had told the Chesapeake Police that while in lock up in May of 1985, that Coleman Wayne Gray had told him that he had killed the Sorrells.

Q Where did Mr. Gray say he had heard that?

A I don't know. Quite frankly, I wouldn't have recollected any of that but from Mr. Eason's notes this morning.

Q There is nothing in his notes to indicate where Mr. Gray heard that?

A No.

Q What else did Mr. Gray tell you?

A That's all I can remember. As to that particular issue on Keith Godwin.

Q What about other statements attributed to Mr. Gray admitting responsibility for the Sorrell murders; what else did he say about that?

A He denied making those statements. I'm pretty sure he denied making those statements.

Q Did you ask Mr. Gray if he had in fact committed the Sorrell murders?

A I sure did.

Q What did he tell you?

A He did not. I asked him on more than one [62] occasion because it was a burning issue with me at that time.

Q He didn't tell you, I gather, that he had bragged to Mr. Tucker that he had committed the Sorrell murders?

A I'm pretty sure he denied that. I can say with certainty that he never admitted he said that to Tucker.

Q During the trial, when you were presented with the statements of the Commonwealth's witnesses as they took the stand, as you described in your direct testimony, did you ever request a recess before cross examining them so that you could review the materials that were given to you?

A No.

Q I understand that having not practiced law for ten years, you don't feel yourself fully familiar any

longer with BRADY v. MARYLAND. I gather then, would it be fair to say you are not familiar at this point with the federal practice pursuant to JENCKS v. UNITED STATES?

A No, I'm not.

Q Now, you mentioned the photographs about the Sorrell murders and the autopsy reports and the medical testimony that was introduced about the [63] Sorrell murders. You know nothing inaccurate about that information that was produced, do you? You have no reason to suggest that the photographs did not accurately depict the crime?

A No.

Q You have no reason to suggest that Dr. Pressawalla was incorrect in his testimony, medical testimony?

A No.

A No.

Q Or that the autopsy reports were incorrect.

A No.

Q Your only problem is to question whether Coleman Gray was responsible for the Sorrell murders.

A No.

Q And that was dependent on Melvin Tucker's testimony, correct?

A I wasn't in a position then nor am I now to defend Wayne Gray on the Sorrell murders.

Q And at this point, ten years later, you don't know anything inaccurate about that information, except that in your opinion, Mr. Gray is not responsible for them; is that right?

A You want my opinion as to whether or not he killed the Sorrells?

Q No, sir. I'm not asking for an opinion. I'm [64] asking for cold, hard facts within your knowledge.

A As to what?

Q As to whether any of the information that was presented at the trial with respect to the Sorrell murders was inaccurate other than what you contend was the falsehood or inaccuracy of Melvin Tucker's testimony.

A No. It was all – I have no argument with the accuracy of it whatsoever.

Q Okay.

A The only evidence that came in –

Q Excuse me, there is no question before you right now, Mr. Moore.

MR. McLEES: I have no further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. TURNER:

Q I believe Mr. McLees asked you some questions about whether you were provided – excuse me, whether you had requested certain information prior to the penalty phase in the McClelland trial?

A That's correct.

Q I take it, sir, that you had filed the motion which we talked about earlier for discovery which was [65] referenced previously as Exhibit 11 that you looked at.

A That's correct.

Q I take it that the order which was Exhibit 12 entered by Judge Godwin concerning discovery had been entered at that point?

A That's correct.

Q Do you know if that order, if that motion would be characterized in the vernacular of lawyers as a BRADY motion, sir?

A That's correct.

Q At the time of the McClelland penalty phase hearing, did you have any concrete information as to whether Timothy Sorrell was a serious suspect at all in that, in the Sorrell matters?

A No.

Q For example, did you know at that time whether he might have been immediately exonerated or investigated vigorously or whatever?

A At some point in time, I don't know whether it was before or after, whether it came from Slezak or the TV or newspaper or through some other lawyer, I was told that he had struck a deal, that Brydges had struck a deal for him so he would be forever barred from any prosecution. That's all I ever heard.

[66] Q Did the prosecutor, Phil Ferguson, ever mention Timothy Sorrell to you, sir?

A I can't remember.

Q Looking back, sir, I realize we are looking back nine years, but looking back, were you the attorney who was assigned the task of dealing with the three witnesses who were presented on the Sorrell murders on December 6th, 1985?

A Yes. Talking about Slezak and Pressawalla and Melvin Tucker. Probably so.

Q Am I correct that if there was to be any cross-examination of those witnesses, you were the one who had been in essence assigned that task?

A That's correct.

Q Do you feel, looking back today, that you had any information that would have allowed you to do an effective cross-examination of those witnesses?

A Not any new information that was given to us, no. Remember that Melvin Tucker had been fully and extensively and well cross-examined during the guilt phase of the trial. The same jurors who were sitting there during the guilt trial were there during the penalty phase and they had been told and drawn a pretty accurate picture as to why Melvin Tucker would strike a deal and tell anybody anything they wanted [67] to hear. To save his life. That didn't need to be brought up again.

Q That examination didn't deal with the Sorrell murders, however?

A No, it had to do with his plea agreement with the Commonwealth.

Q Focusing strictly on the Sorrell murders on December 6th, my question might not have been clear, do you feel that you had any information to cross-examine Mr. Tucker or Pressawalla or Slezak on the Sorrell murders?

A No.

Q I believe you said earlier that a good trial lawyer doesn't ask a witness a question unless he knows, has a reasonable idea of the answer; is that correct?

A That's generally correct, right. Everybody messes up every now on then on that, though.

Q Would it be fair to say if it meant a person's life is at risk, taking a chance on a question like that would be a little foolhardy?

A Very foolhardy.

MR. TURNER: Thank you. That's all I have.

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In the United States District Court
for the Eastern District of Virginia

[Caption Omitted In Printing]

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DIRECT EXAMINATION

[68] BY MR. TURNER:

Q Sir, would you please state your name and address for the record?

A Carl Edward Eason, Jr., known as Ward Eason, my nickname. My office is 200 North Main Street in Suffolk, Virginia.

Q What is your occupation?

A I'm an attorney.

Q How long have you been practicing law?

[69] A Since 1979.

Q Would you please provide the Court a brief overview of your educational background?

A Went to Windsor High School in Isle of Wight County, adjacent to Suffolk, Virginia. I attended undergraduate at Hampden-Sydney College from 1972 through 1976, graduated with a B.A. in economics. Then I attended William & Mary Law School, Marshall-Wythe School of Law, from 1976 through 1979 and graduated in 1979.

Q Focusing back on the period generally around May of 1985, nine years ago, what was the general nature of your law practice at that time?

A I was then and still am with two other attorneys. It is a three-man, three-lawyer office. With staff, about seven or eight. General practice of law. As a matter of fact, up until, from 1979 through 1983, Mr. Moore, Jim Moore and I, who just left the witness stand, and I actually practiced together. In 1983 he went out on his own and opened up his own office and I remained with the two other attorneys. So it was a general practice, did criminal work, obviously civil work, bankruptcy work, which is what I do a large amount of now. But back then it was a very general practice.

[70] Q As of May of 1985, had you ever handled a capital murder case?

A No.

Q Am I correct that you were involved as co-defense counsel for Coleman Wayne Gray in the McClelland capital murder case?

A That is correct.

Q I believe Mr. Gray is here this morning. Do you see him?

A Yes, I recognize him.

Q How did you come to be involved in the McClelland murder case?

A Mr. Moore, as I mentioned to you, who was not in practice with me at that point but had been back two years previously was appointed first by the courts in Suffolk. And then I think a few days later, maybe a week or so later, it was my understanding that he asked for an additional counsel to be appointed to assist him and he

asked that I be the one that did it, that would be appointed as additional counsel and I was notified by the Court and asked if I would be willing to undertake it and I said I would.

Q In general, what was the nature of the McClelland case, just generally?

A Well, obviously it was an abduction and murder [71] and robbery, capital murder and robbery charge. If you need more than that, I'll be glad to explain. I'm just not sure exactly what your question is.

Q Was there an issue in that case, did you come to be deeply involved in analyzing the legal issues in that case?

A Yes, of course. Obviously it being a capital murder charge, and because both personally never having handled one and just within the area, within the courts of Suffolk, it being a relatively infrequent if not extraordinarily unusual type of charge that would come forward, there wasn't a whole lot of information readily available either through prior work that I had done or maybe just from other attorneys in the area who had handled those. So obviously both Mr. Moore and I were deeply involved in getting the legal issues resolved up front in front of us so we would know what to be expecting, what we had to address and how we needed to approach the case. Certainly it was intensive in the sense of much more so than any other criminal case I've ever been involved in.

Q Do you still do some criminal work?

A Some, but very little.

Q Was there an issue in the McClelland case that I [72] would call the triggerman issue?

A Certainly.

Q Could you briefly provide the Court background on that?

A Certainly the way I interpreted the laws of the Commonwealth of Virginia back in 1985, it was that in a capital murder charge, only the individual who in fact committed the murder as a principal in the first degree is the true triggerman, as we were calling it, could be the one that could potentially be given an imposition of the death penalty. That anyone else involved in a charge and ultimate conviction of capital murder, if he was not the triggerman, could not be given that death penalty. So clearly, we quickly defined it in the McClelland case where there were two – originally three defendants named. Of course Coleman Wayne Gray, Melvin Tucker, and Melinda Gray. Obviously the issue very quickly focused on that as being the prime matter, who pulled the trigger. I said two. It became clear to us that Melinda Gray was not the triggerperson. It was either Tucker or Gray that the Commonwealth was going to focus their attention on as to who in fact shot Mr. McClelland.

Q Who was Melinda Gray?

[73] A Coleman Gray's wife.

Q Was there a factual issue concerning who the triggerman was?

A Yes.

Q What was the general nature of that?

A Well, the way the facts evolved throughout the investigation and certainly through the trial, is that two individuals, Melvin Tucker and Coleman Wayne Gray, abducted Mr. McClelland on a road late one evening as he was driving home from his place of employment. And after robbing the store where Mr. McClelland was employed, then taking him to a secluded area in Suffolk and subsequently, of course, Mr. McClelland's body being found having been shot, again, there was no indication of anything other than Coleman Wayne Gray and Melvin Tucker being the two people that abducted Mr. McClelland that evening. Certainly, also the understanding of the facts as they evolved is that each Mr. Gray and Mr. Tucker were saying that the other was the gentleman who pulled the trigger.

Q Did there come a time when Mr. Melvin Tucker obtained some sort of plea bargain in the case?

A Yes.

Q Do you recall that?

[74] A Well, I recall – I don't recall exactly when. I believe certainly discussions, again from recollection and from review of my files and notes, is that that sort of thing was certainly progressing probably from early in the case up until the time of trial. I believe the actual plea agreement that Mr. Tucker had probably wasn't actually dated and therefore, I'm assuming, signed by him and the Commonwealth until sometime shortly before the trial, sometime maybe in November of 1985. But again the record will bear me out better than my memory on that. We knew the plea agreements were obviously being negotiated between Mr. Tucker and the Commonwealth.

Q Did you at some point see the plea agreement with Mr. Tucker?

A Yes, I did. Obviously.

MR. TURNER: Could I ask that the witness be shown the exhibit book?

(Documents proffered to witness.)

BY MR. TURNER:

Q I'd like to focus on Exhibit 8, please, sir. It should be a two-page document.

A Okay.

Q Have you seen that document before, sir?

[75] A I cannot sit here and tell you I have seen this document before. I haven't read every word right this second. It seems to indicate that this is an agreement that the Commonwealth entered into with Mr. Tucker through his attorney, Andy Sacks, out of Norfolk. I can just recall that we were, and I was aware that there had been a plea agreement entered into, and perhaps we were provided a copy, but I just can't tell you right now whether we were provided a copy of this letter or when we were provided it.

Q I notice that the agreement seems to have been signed on the second page on November 20th, 1985.

A Yes.

Q Does that comport with your present recollection?

A Yes, it does. That it was sometime not too far in advance of when the trial actually occurred.

Q Did you get involved at all in any sort of fact investigation into the McClelland case?

A Yes.

Q In what sense, sir?

A Beyond, obviously, discussing the matters with Mr. Gray on numerous occasions, trying to help identify who other potential witnesses would be and interviewing those witnesses either by phone or on [76] several occasions, going out to where that person may work or I specifically recall living, not where anyone worked, but certainly living, obviously that would have been most if not all the police investigators involved in the matter. I remember going out so to the scene and one of the police officers, I believe Officer Coco, actually carried us to the scene and showed how he had found the body. We went to the neighborhood where Mr. Gray lived. We went to the apartment buildings where he lived and talked to some people around in that area to see if we could find anything that would help us in the defense of Gray.

Q You are talking now about the McClelland murder; is that correct?

A That is correct.

Q Were you provided copies of any physical evidence analyses concerning the McClelland case? Do you have any recollection of that?

A I have a recollection that we were provided certain reports, autopsy reports. I believe there were no ballistic reports in this case because of the condition of the weapon, if memory serves me correctly. And while it is not, I guess, directly related to what's occurring right

now, there were [77] some drug-related charges as well Mr. Gray had arising out of his arrest at the time and I also got reports on those sorts of things. They were not tried at the same time in December, but again, they were sort of part and parcel of this whole representation I had of Mr. Gray so we were given certain reports, yes.

Q With respect to the McClelland case, there was some sort of provision of information from the Commonwealth's Attorney's Office to you; is that correct?

A Yes. And they let us review the evidence as well. I remember there being one instance when arrangements were made with Phil Ferguson, the prosecutor, Commonwealth's Attorney for the City of Suffolk, where we all met down in the evidence room of the police station and they were showing literally everything they had in the case pursuant to a Court order. I can't recall what all those items were without looking at my notes, but meeting with Phil down there, and I believe Detective Logan was present and just going through the case of any potential physical evidence.

Q This is with respect to the McClelland murder?

A That is correct.

[78] Q Would you look at Tab 12, sir, in the book you have?

A Yes.

Q There is an order there. Take a moment to look at that. You have mentioned an order in your testimony a moment ago. Would this be the order you are referring to?

A That's what I consider the discovery order in the case.

Q The discovery order?

A Yes.

Q What in general did you understand that order to encompass?

A Well, I guess maybe a couple of different areas. One, to provide us, without trying to just read from the order –

MR. McLEES: I object. The order speaks for itself and we are not hear on ineffective assistance of counsel.

THE COURT: Sustained.

MR. TURNER: I'll withdraw that, Your Honor.

BY MR. TURNER:

Q Do you recall the morning of December 2nd, 1985?

[79] A That was the morning that the trial began, a Monday morning.

Q Did an event occur that morning concerning another matter, called for want of a better term, the Sorrell murders?

A If you are speaking of in the Judge's chambers when we made some preliminary motions before we began the selection of the jury, yes.

Q Just generally, what was the nature of those motions from your perspective that morning?

A The nature of the motions?

Q Yes.

A Again, Mr. Moore, I believe, verbally made the motion, although obviously I was aware of it and we discussed it to some degree prior to when he made it. We had come to believe that at the penalty phase, if it got to that point, that the Commonwealth was going to introduce evidence, and we didn't know what, in some form or fashion attempting to connect Mr. Gray to what was known as the Sorrell murders in Chesapeake. We were obviously extremely concerned about was it going to happen, and if so, to what extent was that going to happen. So of course Mr. Moore made the motion, as the record reflects, better than I can recall, probably, to know what that [80] evidence was going to be Monday morning so that we could begin preparation for trying to rebut or defend against it if it came to that point.

Q Was Mr. Ferguson present that morning?

A Oh, yes.

Q Do you recall him indicating what if anything would be provided concerning that matter?

A As to the evidence that would be produced?

Q Yes, sir.

A I recall not being given a lot of information. And then, of course, I had read the transcript again recently of the motions made that morning. And that obviously refreshed my memory as to what Mr. Ferguson said. And it was just simply that there were going to be statements, be evidence of statements given by Gray that he had

committed the Sorrell murders. And I remember thinking, well, who did he make them to and how do we attempt to potentially rebut those, and therefore, wanting to know who was going to be saying that he made these statements and what were the specifics of those statements. And that information was not provided to us by Mr. Ferguson or by the Court on Monday morning, again, as to whom he had made these statements to.

Q Was any additional information provided Monday [81] morning concerning the Sorrell matters to you by either Mr. Ferguson or the Court?

A Not that I can recall.

Q I take it the McClelland trial ensued?

A That is correct.

Q And it went on, as we understand it, until the guilt phase part, until the end of Thursday, December 5th, 1985?

A That's right.

Q In general, what was your role in that, in the guilt phase of the trial?

A Mr. Moore and I sort of divided up. There was no real rhyme or reason as to which witness of the Commonwealth he may cross-examine, as to which one I would cross-examine. We tried to evenly divide the load concentrating on that particular witness for cross-examination purposes.

Similarly, in any potential witnesses we put on, maybe I would have prepared one witness where Mr.

Moore would have prepared another in the defense of Mr. Gray. Backing up, in the selection of the jury, it was a joint matter. We were both sort of keeping our heads together as we were going through that process and trying to best decide how to best select the jury. I think I recall that I probably took the [82] lead in the jury selection by doing the voir dire to the extent Judge Godwin let us do voir dire of the jurors ourselves rather than Mr. Moore, and I believe Mr. Moore may have made the opening statement to the jury. Then I made the closing argument to the jury, I remember, in the guilt phase.

Q Just generally, and I know you don't have any precision, if you don't know, don't worry about it. But generally, how many witnesses did the Commonwealth present in the guilt phase, just a real rough idea?

A Maybe 12. I truly cannot say that I recall very vividly at all. That's just a rough estimate.

Q Was there extensive physical evidence presented in the McClelland case?

A Yes. I would say so. In the sense of photographs, of course, and scenes of the victim and scenes of the crime itself.

Q I take it there came a time when the guilt phase was over?

A Thursday evening, I think, the jury returned the verdict.

Q The verdict was?

A Guilty. Guilty of capital murder. Among others.

[83] Q Do you have any general idea when that verdict came in on Thursday? I know it is a long time ago.

A I really don't. Again, I think my notes may reflect it if you want me to refer to them, but beyond that, I'm pretty certain it was mid to late afternoon.

Q Subsequent to that verdict being rendered, did there come a time when you had any different understanding of what was going to happen at the penalty phase than the one you had gotten from the previous Monday?

A After the penalty phase concluded Thursday afternoon, as had been the practice, basically, throughout that entire week, Mr. Moore and I met back at his office to prepare for the next day and spread out on his conference table and we started getting things together. It was that evening, I recall, that we made an attempt to contact who we understood may be a potential witness in the Sorrell issue, and that was Detective Slezak out of Chesapeake. And I believe we attempted to contact him by phone from Mr. Moore's conference room and ultimately, we were able to track him down and ask him a few questions that night. I don't vividly recall all the information that was given to us that night from Mr. Slezak, [84] other than that we knew he had been subpoenaed as a witness and was prepared to testify the next day as to the Sorrell murders.

Q Prior to that evening, the evening of December 5th, 1985, prior to that evening, had you ever heard of Detective Slezak?

A I cannot say for certainty whether it was – whether I heard about him on the fourth or the third, or the fifth, what time frame while we were trying the case. I'm certain that I had never heard of him prior to certainly the 2nd, and I think it was probably closer to the 6th when his name ultimately surfaced.

Q The evening of the 5th was literally hours before the penalty phase of the McClelland trial was to begin?

A The penalty phase started at, I think, 10 o'clock on Friday morning.

Q Did the Sorrell matter come up at the penalty phase?

A Certainly.

Q Can you relate to the Court just generally what transpired from your perspective that day?

A Well, we initially, as the record I think bears out in the transcript, we made a motion, again, Mr. [85] Moore made this motion, to exclude any evidence of the Sorrell murders into the penalty phase. That motion was, for all practical purposes, overruled by Judge Godwin. He allowed the evidence that did come in, obviously, to come in.

Q Did there come a time when you first had an impression that something more than statements was going to be dealt with in the Sorrell context?

A Yes. When I recalled it exactly, I cannot tell you. I feel it was probably sometime that Thursday that we ultimately realized that the evidence would probably be more than just an unknown individual or maybe

unknown individuals – I shouldn't say unknown totally but not knowing who the individuals would be getting on the stand saying Mr. Gray said he committed the Sorrell murders. I think it was probably Thursday we knew it would be more than just that. Without recalling specifics from nine years ago, just looking at it in general from a perspective of eight-and-a-half years ago, I believe it was when we started having conversations with the detective from Chesapeake that Thursday night from Mr. Moore's conference room, we knew it would be more than that. Therefore, Friday morning, we made a motion not to allow any evidence to come in as being inflammatory [86] and prejudicial. The evidence obviously came in. Mr. Tucker reappeared on the stand, of course, and made the statements that Mr. Gray had confessed to him or stated to him in a bragging fashion that he had killed the Sorrells, and then of course Detective Slezak and I believe Dr. Pressawalla got on the stand and presented their evidence. Detective Slezak as to his investigation of the Sorrell murders, and Dr. Pressawalla as to his conducting of the autopsy of the bodies.

Q When you were sitting in the counsel chair that morning, December 6th, and this testimony that you just recited was going on, do you have any recollection of whether you felt prepared as an attorney to deal with that testimony?

A I did not feel prepared to deal with it.

Q What kind of feeling is that?

A We had been hit on the side of the head, and literally were not ready to be able to try to defend a second murder conviction – excuse me, second murder

charge with the notice and time frame that we had been given at that particular point.

Q As I understand it, Mr. Moore actually tried to handle whatever cross-examination occurred. Do you have any recollection at all of what if any [87] cross-examination occurred or the Sorrell witnesses, the three witnesses that were presented?

A I don't believe that any cross-examination occurred of Tucker. Simply because we did not know what he was going to say. We had requested through his attorney, Andrew Sacks, to interview him. Mr. Sacks had denied us the opportunity to meet with him. And as taught in law school, if you don't know the answer to the question, you don't ask the question. Of course we didn't know what to expect from Tucker when he got on the stand and after he had made the comments he had made and after we had already, to the degree we had, attacked him on his credibility in the guilt phase, we thought it was best to leave Tucker alone and just argue to the jury that Tucker was still lying like he had lied in the guilt phase and leave it at that. With Detective Slezak, again, from reviewing the transcript recently, Mr. Moore, of course, asked him some questions and I remember Mr. Moore's angle of those questions were, well, could not this have been a copycatting type of murder in Chesapeake similar to McClelland, McClelland to Sorrell, and therefore, copycatting type of murder would imply two different people committing the murders, and I remember Mr. [88] Moore trying to bring that out potentially for him to be able to argue to the jury when he got up.

Q I take it the result of the penalty phase was a death sentence for Mr. Gray; is that right?

A That's right.

Q Do you have any recollection of being involved subsequent to that with respect to any further contact with the Court concerning the Sorrell matter, the Court being Judge Godwin?

A Well, of course after the jury returned the verdict, then a Presentence Report was prepared and it was set down for the Court to impose sentence and I think it was done in sometime, mid to late January of mid-1986. We of course filed a written motion, made an oral motion on that sentencing date to set aside the conviction and the sentencing arguing that the Sorrell evidence was improperly admitted into evidence. The motion, of course, was denied. We also were preparing during that time period, of course, trying to gather together, for lack of a better term, character witnesses and anyone else we could bring in to try to convince Judge Godwin that notwithstanding the jury's relation of sentencing, ask him to set it aside and impose a life sentence. So we obviously were focusing in on that very [89] strongly.

Q Prior to Friday, December 6th, 1985, the beginning of the penalty trial, did Phil Ferguson, the prosecutor, ever bring to your attention that there might have been other suspects or another suspect in the Sorrell case or that someone else may have said that someone else committed the Sorrell crime other than Mr. Gray?

A I do not recall that at all.

Q Do you recall Mr. Ferguson ever presenting to you any – strike that. Do you recall Mr. Ferguson ever talking with you at all about the Sorrell case, aside from the formal in-chambers proceeding that we have already gone over?

A No, I do not.

MR. TURNER: That's all I have, Your Honor.

THE COURT: All right. Mr. McLees?

CROSS-EXAMINATION

BY MR. McLEES:

Q Good morning.

A Good morning.

Q You mentioned in your direct testimony that on the Monday morning the trial started, you had come to believe that the Commonwealth would introduce [90] evidence connecting Mr. Gray to the Sorrell murder.

A Yes.

Q How did you come to that belief, sir?

A The week prior to the beginning of the trial, we had come across the name of a Keith Godwin as being a potential witness. While my notes will bear it out, I think I'm accurate in what I am getting ready to say as far as dates are concerned. On Friday, the 29th of November, we met or I met, I should say, I don't think Mr. Moore was present, based on my notes, I met with Keith Godwin, it appears probably in the Suffolk jail, to ask him what was going to be his testimony. He would not discuss it with

me and said he wanted to talk to his lawyer, who happened to be a lawyer in Suffolk named Frank Rawls. He said I want to talk to Frank Rawls before I tell you anything. So it went nowhere with that. Later on that day, Mr. Moore and I went to meet with Mr. Gray again. He was during this time period in the Hampton City Jail. For security reasons, they had put Mr. Tucker and Mr. Gray in different locations. We brought up the name of, among others, to try to get some ideas of what may happen with potential witnesses, Keith Godwin. Mr. Gray indicated to us at that point that Mr. Godwin had told Chesapeake Police that Mr. Gray had [91] told him he had killed the Sorrells. That is based on notes and recollection. Therefore, that's the first time I can recall focusing in on the fact that the Sorrells or the Sorrell issue was going to be an element in the McClelland case. I hope that answers the question.

Q So you actually knew the week before that that was going to be an issue?

A We knew that Friday.

Q I see. Now, how did Mr. Gray say he had learned that Keith Godwin had supposedly told the Chesapeake Police this information?

A I do not know. Again, I've looked in my file notes recently. It doesn't say how Mr. Gray said I know Keith Godwin said this other than that it is in my notes.

Q Do you know that you asked Mr. Gray that question?

A I cannot recall whether I asked him "How do you know Godwin said this."

Q You may have and forgotten the answer?

A May have and forgotten the answer, may have not asked it. Just don't remember.

Q The Sorrell murders were highly publicized?

A Yes.

[92] Q Likewise publicized was the fact that at one point Timothy Sorrell was a suspect?

A Obviously that is an issue now. If that was highly publicized, sitting here today, I cannot recall that being a fact. Because you have asked the question, let me respond. It was a highly – the Sorrell murder was highly publicized. A young lady and her daughter. It sort of tugs at the emotional strings. However, it was not a case that I personally followed on in the newspaper on a day-to-day basis, being something that I was picking up facts on. It was another case in another jurisdiction I had no contacts with.

Q After Mr. Gray had been sentenced to death in the proceeding where evidence was introduced to connect him to the Sorrell murders, did you go back and read the news articles about the Sorrell murder?

A I don't recall. I may have very well have. I do not recall.

Q Do you recall whether you did any investigation of the facts of the Sorrell murders after Mr. Gray's trial?

A No. I mean, I recall that we did not do any investigation of the facts, certainly to the degree of what I would call an investigation, no. Digging [93] up potential

witnesses, talking to witnesses, looking at physical evidence, going to the scene, did not do any of those things.

Q Had you asked Mr. Gray whether he committed the Sorrell murders?

A Yes.

Q What did he say?

A He denied it.

MR. McLEES: No further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. TURNER: No, Your Honor.

* * *

No. 95-6510

(7)

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J.D. NETHERLAND, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
Volume II, Pages 180-376

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In the United States District Court for the
Eastern District of Virginia

[Caption Omitted In Printing]

* * *

[94] MICHAEL SLEZAK,

called as a witness by and on behalf of the Petitioner, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Good morning, detective. I'm Donald Lee and I represent the petitioner, Coleman Gray. Can you please state your name and address?

A My address?

THE COURT: You, don't have to give your address. Just what locale.

THE WITNESS: Michael R. Slezak. I live in Chesapeake, Virginia.

BY MR. LEE:

Q What do you do?

A I'm a police officer.

Q Where do you work?

A For the Chesapeake Police Department.

Q How long have you worked for the Chesapeake Police Department?

A Of and on, for 22 years. I have ten months broken service.

[95] Q What did you do during that ten months?

A I worked at Volvo of America Corporation and Norshipco.

Q So you weren't working in police work?

A Not during that time.

Q Before you went with the Chesapeake Police Department, were you involved in law enforcement?

A No.

Q What did you do then?

A I was in college for two years and prior to that I was in the Marine Corps.

Q Now, you testified in the penalty phase of Coleman Gray's capital murder trial; is that right?

A Yes, sir.

Q Can you describe for us the testimony that you gave?

MR. McLEES: Judge, I object. His testimony is in the record. His description of it is really, frankly, irrelevant.

THE COURT: Sustained. If you have some specific questions, go ahead.

BY MR. LEE:

Q Were you involved in the investigation of the murders of Lisa and Shanta Sorrell?

A Yes.

[96] Q Can you describe your role in that investigation?

A I was the chief investigator and was involved in the vast majority of the interviews and investigation.

Q How many other people in the Chesapeake Police Department were working with you on this case?

A Altogether, regardless of their amount of time that they were involved?

Q People who had substantial involvement.

A Probably five or six people had substantial involvement. The others may have been a one-day involvement or their activity was unfruitful.

Q Can you tell us who those five or six people are?

A Sergeant Harrison, then Detective Harrison; ID Officer Jack Dempsey, ID Officer Boyd Alsop; Lieutenant Ziegler, Detective Colin Riggs, and Detective Hartley.

Q Were these murders highly publicized?

A Yes.

Q Can you tell us a little bit about them and why they were highly publicized?

A Originally, the complaint came in of a missing person in the jurisdiction – or who had [97] jurisdiction in

the case was uncertain originally. The complainants who called to make missing person reports would call one department and they would be referred to another because the victim resided in one city, was last seen in another city, and supposed to go to a city in which they didn't reside. But throughout the evening, there were numerous calls made and finally, a missing person report was taken. That was on December 5th. And 5 days later, the vehicle was found with both victims in it.

Q And the victims were?

A Lisa and Shanta Sorrell.

Q Was any criticism leveled against the Chesapeake Police Department during the course of the investigation? You talked about this jurisdiction uncertainty.

A I'm sure there was. Someone criticizes everything.

Q Did that have something to do with the publicity that the case received?

A The criticism?

Q Yes.

A No, I think the criticism for the most part was the problem with getting the investigation or the reports initiated.

[98] Q Can you describe for the Court the early days of the investigation before you had developed any suspects?

A In what respect?

Q Well, what were you doing as lead investigator?

A The first –

MR. McLEES: Judge, excuse me, Your Honor. I would object. If he is going to ask him day by day what he did in the investigation, BRADY doesn't require an accounting of the investigation. It is unreasonable to expect it. It is irrelevant. It is a waste of time. If they think that the police withheld BRADY materials' let them ask that.

THE COURT: I tend to agree with you. Be more specific. We can't sit here all day as he recounts his entire investigation. I mean, I'll let you ask him what he did initially, but after that, let's get specific.

MR. LEE: Sure. I plan to get specific right away, Your Honor. I just want to get a little background for the Court.

BY MR. LEE:

Q During the early days of the investigation, before you developed any focused suspects, can you tell us what the major focus of your investigation [99] was, what you were trying to do and how you were trying to do it?

A Primarily it was collection of evidence and processing evidence that we had already collected. The car was – the victims – well, let me back up. The location where the vehicle was seen was processed as best we knew how at the time. The vehicle was then moved to police headquarters and both the vehicle and the victims – we were in the process of collecting evidence there. Subsequently, the vehicle was partially dismantled, and Sergeant Harrison and I transported parts of it to the

laboratory in Washington, to the FBI laboratory. I would say that the first three or four days, the majority of the time that we spent dealt with processing evidence.

Q After these first few days, did you eventually develop a suspect?

A Well, there was a suspect was developed that night.

Q Which night?

A The evening of the 10th when the bodies were found.

Q Who was that suspect?

A Timothy Sorrell.

[100] Q And how did you develop him as a suspect?

A I went to his – I think we were at his mother's house. We went to talk to him after the bodies had been positively identified. We had a conversation with him, and his statements caused myself and Sergeant Harrison to be suspicious of him.

Q Why did these statements make you suspicious?

A When we went into the house, it was late the evening of the 10th. As we came in we identified ourselves and this mother said, you don't have to tell them anything. Talking to her husband – I mean to her son and referring to us. We were taken by her statement. We asked Mr. Sorrell or told him that we were there to answer any questions that he might have. And we asked him if he had any questions, and he paused and his first question was whether or not we had a helicopter up

looking for the vehicle. I told him that we did not. He paused, then I asked him if he had other questions. He asked why he was – why we were so late in notifying him that his wife and child had been found. I told him that we were – we wanted to make certain that it was them, again, wait until we had a positive identification. With that, he said he had no other questions. And no [101] other conversations with him took place that night.

Q Was there anything else about that evening in your conversation with him that raised your suspicions?

A Not that evening, no. That was sufficient.

Q Did you develop further suspicions after that?

A Yes. There were general comments that he would make, his demeanor made us highly suspicious.

Q What about his demeanor?

A I don't know how to describe it other than to say that it was not what you would expect to find in a situation like that. He just seemed defensive.

Q Did you or anyone in your police department put Timothy Sorrell under surveillance?

A Yes.

Q Why did you do that?

A We were suspicious of him.

Q Can you describe that surveillance for us?

A I think that it occurred over a three-day period of time. The detective bureau, some uniformed officers, would keep his mother's house where he was staying

under surveillance by vehicle. The officers would be posted in several locations, and occasionally they would ride by the house to see, assure themselves that the vehicle was still there. [102] They would follow him if he left.

Q Did you learn anything – did the surveillance raise any further suspicions?

A Not that I recall.

Q Did Timothy Sorrell have an alibi for the time of these murders?

A Yes.

Q Can you tell us what that alibi was?

A He said that he was at a friend's house.

Q Did that alibi check out?

A According to the person with whom he was supposed to be visiting, she and her husband confirmed that he was there.

Q Did he ever tell you prior to that that he had been at the Chesapeake Technical School?

A I believe he did.

Q So that was his first alibi?

A Well, I don't know what order it came in or exactly how he said it, but we checked the records to see if – I believe it was his cousin that was supposed to be there, and not Mr. Sorrell himself. His statement, as I recall, was that he was at, I think it was Deborah Robertson's house. We checked. She lived in Norfolk and we checked with her and she said that he was there.

[103] Q So your recollection is that he never told you that he had been at Chesapeake Technical School from 7:30 until 10 o'clock that night.

A I don't recall him saying that he was there, I can't say that he didn't, but I don't recall that.

Q Did you ever establish a possible motive for Timothy Sorrell to have murdered his wife and his daughter?

A What do you mean by establish?

Q Did you ever learn any information that led you to believe that he may have had a motive?

A Yes. There was – we received an anonymous call that he had recently secured a life insurance policy for his wife. I believe it was in excess of $50,000. $50,000 or in excess of that.

Q How recently? How many days prior to her murder had he obtained that life insurance policy?

A I think it was within two weeks.

Q Did you follow up on that lead?

A He did in fact get the insurance.

Q Did you investigate any other possible motives, did any information come to light that led you to believe that he had other motives?

A We investigated everything that was brought up. There were any number of calls that people made. [104] Some of them we really didn't put any faith in when we received them, but someone would follow those up. I am not aware of any information that we received that we

didn't check into as far as suspects are concerned. Himself or someone else.

Q Can you tell us about some of the leads that you did put faith in? Do you remember receiving phone calls that led you to something substantial?

A Well, there was some people or several people who lived in the area where the car was found said that they saw some people walking down the road. Other people said that there was a small Chevette that was seen on the road. We investigated those, looked for – we were looking for people who had a Chevette with a red stripe on it. Every time somebody saw one they would give us the license number and we would check into those individuals to see if we could find out anything. There was nothing that we could find that was associated with the murders.

Q Did you investigate at some time that there may have been a possible drug connection, that that somehow played into the murders?

A We looked at that also, yes.

Q That was something you believed may have [105] involved Timothy Sorrell?

A Yes.

Q Was his brother arrested in connection with all of that at one time?

A Subsequently he was arrested, yes.

Q And did you question his brother when he was arrested?

A I'm not certain that I talked to him. I don't think that I talked to him concerning those charges after he was arrested. We didn't learn anything from that that would tend to incriminate Mr. Sorrell.

Q Was your goal to learn things, though –

A Timothy Sorrell, I should say.

Q Was your goal, though, in that arrest and in that interrogation to see if you could learn things that might help you in your investigation against Timothy Sorrell?

A Well, in the investigation in general, and Timothy Sorrell. We didn't work the case with the exclusive idea that he was the only possible suspect. He was the primary suspect at that time.

Q Who were the other suspects at that time?

A There weren't any by name.

Q Then what were they?

A The possibility is that someone else could have [106] done it. We didn't exclude that possibility. Whoever the unnamed or unknown individual in a Chevette was was a possible suspect. They were in the area, but we didn't know who they were. That sort of thing. Because we have a suspect, we don't eliminate any other possible information. I mean, we follow up what we have, whether we know a person's name or not.

Q Sure. But the only named suspect at the time was Timothy Sorrell? At that time?

A At that time, yes.

Q All right. Have you compiled an investigation file for the Sorrell case?

A Yes.

Q And have you reviewed that file to prepare for this hearing?

A Have I reviewed it?

Q Yes.

A Yes, I've reviewed it.

Q Is that the file, the investigation file in front of you?

A It is part of it.

Q What other parts of it exist, just generally? How much information do you have?

A How much information?

[107] Q Well, I read a Virginia Pilot article on 12-15-85 that said that you had four, three-inch thick binders, 14 cassette tapes and eight videotapes. Is that about what you have?

A The stack of paperwork would probably be 18 inches to two feet thick. There are videotapes. I can't tell you exactly how many there are.

Q Sure.

A Probably less than – I would say less than 6 videotapes and a large number of audiotapes.

MR. LEE: Could Detective Slezak please see the Petitioner's Exhibits?

(Documents proffered to witness.)

BY MR. LEE:

Q I'd like you to turn to what's listed as Petitioner's Exhibit 3 there, and it actually is comprised of several documents, A through G. Have you found those?

A I'm in three.

Q Okay. Those are Certificates of Analysis?

A Yes.

Q Could you take a quick look at all of them? Just the first page of each one is okay. Do that before I ask you the next question.

A Would you tell me what you want me to be looking [108] for?

Q Well, I'd like to know whether your investigation file contains these documents.

A All right.

(Witness perusing documents.)

A They appear to be copies that would be in the file. I can't comment on their authenticity, but they appear to be the ones.

Q We have had these documents certified by Dr. Fierro of the Bureau of Forensic Science and they have been admitted as exhibits. But I assume what you are saying is, this is the kind of information, one of the kinds of information your file should contain.

A Yes.

Q Okay. With respect to document 3-A, can you – this is a Certificate of Analysis dated January 17th, 1985 listing as victims Lisa, Sorrell and Shanta, Sorrell. below that it lists a suspect. Who is that?

A Timothy Sorrell.

Q The evidence was submitted by Detective Alsop. You mentioned his name earlier.

A Yes.

Q He submitted one blood-clotted tube from [109] suspect's perp. kit, item 40.

Do you know why Detective Alsop submitted that blood for analysis?

A Well, there was a large amount of blood in the vehicle. You have to determine where it originated from, whether it is the victim's, whether it is all the victims', or whether some of it is the suspect's. You have to determine its origin. There were any number of possibilities, more than one person had access to this car. And we didn't want to assume that because there was blood in the car, that it was the victims'. So we had to have the laboratory try to determine whose blood it was. And since Mr. Sorrell was at one time a driver of the car, we had his blood. I believe we also had hair samples taken from him.

Q Were you present when he submitted his perp. kit?

A When Mr. Sorrell did?

Q Right.

A I don't recall if I was standing there or not. I'm sure that I was nearby.

Q This is a toxicology report. I understand the need to run Timothy Sorrell's blood to see if it matched the blood in the car. Do you know why a [110] toxicology report was done?

A On him specifically?

Q Yes.

A We probably just asked them to do it.

Q For no particular reason?

A Well, if it came back positive, if it was positive for a particular drug, it would indicate that he was using some sort of drug. I'm assuming now that we were checking to see if he had some type of drug. But I don't specifically recall doing that. I'm sure that that's what it is.

Q To save the Court's time, I'll flip through these exhibits and note that Exhibit B is a Certificate of Analysis dated January 29th, 1985, again listing Timothy Sorrell as the suspect. And Exhibit 3-C is a Certificate of Analysis dated February 12th, 1985, again listing Timothy Sorrell as the suspect. And other forensic evidence was submitted in connection with that certificate and with that analysis.

Exhibit D is a Certificate of Analysis dated February 14th, 1985, again listing Timothy Sorrell as the suspect. Again E is a Certificate of Analysis dated March 14th, 1985, and it still lists Timothy Sorrell as the suspect. Exhibit F, Certificate of [111] Analysis dated March 20th,

1985 listing Timothy Sorrell as the suspect. And finally, Exhibit G, 3-G, a Certificate of Analysis dated July 30th, 1985, and this Certificate of Analysis still lists Timothy Sorrell as the suspect.

Do you know whether by July 30th,1985, Coleman Gray had been developed as a suspect in the Sorrell murders?

A I would say that he had, yes.

Q Why isn't his name listed here along with Timothy Sorrell's name on this Certificate of Analysis as a suspect?

A Well, I would have to comment on speculation. I can't tell you for sure. I could speculate.

Q Well, is it speculation based on your investigation and what you know from that time?

A Well, you are asking me to comment on someone else's thoughts who typed up this sheet.

Q I won't ask you to do that then. Do you know whether your file contains any Certificates of Analysis listing Coleman Gray as a suspect in the Sorrell murders?

A I'm not certain.

Q Okay. Did you ever – do you know whether Timothy Sorrell owned a gun; was that something that [112] you learned or didn't learn during the investigation?

A I don't know if he did or not.

Q Does your file contain anything concerning a statement made to the Chesapeake Police Department by

a female resident of Portsmouth that Timothy Sorrell arrived at her house on the night his wife and child disappeared and said that Sorrell told her that they were dead?

A If you tell me who the person is, I may know.

Q Well, I don't know the identity of the person, but if you co–

MR. LEE: Could we have the Respondent's book of exhibits given to Detective Slezak, please?

(Documents proffered to witness.)

BY MR. LEE:

Q Let me ask you a couple of questions first. Did you get to know Lisa Sorrell's parents during the course of this investigation?

A Yes, I did.

Q What are their names? Do you remember?

A Mr. and Ms. Nixon. I think that's the way I usually referred to them.

Q Did you talk with them frequently during the course of the investigation?

[113] A Practically every day.

Q Why were you talking with them practically every day?

A Because I felt it necessary in order to collect information both from people that they knew, friends of the family, and information concerning Mr. Sorrell.

Q Can you tell us about the kinds of information you gathered from them concerning Mr. Sorrell? Do you remember specific information? Or general kinds of information?

A We discussed their opinion of things that he would say, his expressions, his emphasis on certain words, where he was. Just everything he did.

Q Do you remember specifically why they were suspicious of Timothy Sorrell?

A Why they were?

Q Yes, why they were.

A I would say at the onset that they probably weren't. We talked to them, told them why we were, and I only assume that they drew the same conclusions.

Q So you discussed some of the information you had with the Nixons?

A Yes.

[114] Q As part of your investigation?

A Yes.

Q I'd like you to turn to the Respondent's Exhibit A in that book and look specifically at page three.

Do you see about two-thirds of the way down that page there is a statement that – well, can you identify that document for the Court, please?

A It appears to be – well, it is a brief filed by – it is a motion for judgment on the part of Herbert and Brenda Nixon.

Q Did you know about the motion for judgment that they filed seeking to bar Timothy Sorrell from receiving the proceeds of the life insurance policy that he had – that had been purchased on the life of Lisa and Shanta Sorrell?

A Yes. I knew that.

Q Did you discuss that possible suit with them before they filed it? Did they tell you about it, that they were planning to do that?

A I can't say for certain that I recall them discussing it or telling me that they were going to. I know that they did.

Q About two-thirds of the way down that page, page three, the judgment states, motion for judgment states that the Chesapeake Police Department received [115] this information from a female resident of Portsmouth that Timothy Sorrel had arrived at her house on the night his wife and child disappeared and said that they are dead, they were dead.

Do you know whether that's something that you may have told Mr. and Ms. Nixon?

A I don't know that I told them that. They may have told me that that occurred. And subsequently, we talked to her. I am not sure where that information originated, whether – whether it first became available to the police department or to Mr. and Ms. Nixon. And I'm not certain who this person is.

Q You don't know whether you spoke to her or not?

A Well, I don't know who it was. I don't recall who it is. I feel certain that if someone came with that information, that we did in fact talk to her. But sitting here right now, I can't tell you who it was.

Q Do you know whether Mr. and Ms. Nixon had contact with Timothy Sorrell, on the night that Lisa and Shanta Sorrell disappeared, whether Mr. and Ms. Nixon had any contact with Timothy Sorrell?

A Yes, they told me that they did.

Q And did they describe anything to you about that [116] contact that raised any further suspicions by you concerning Timothy Sorrell?

A I recall the conversation. I think the way it went is that they passed him at Greenbriar Mall. He was riding around Greenbriar Mall, and they passed him, and I think that he ignored them. I think that's the way it was.

Q Did Timothy Sorrell ever tell you that he had been at Greenbriar Mall that evening?

A I believe he did.

Q Did you follow up on that lead? Did he explain why he was there? Did he have any explanation?

A My recollection is that he was out looking for the car, as were many other people. That she was supposed to go to Greenbriar Mall. And I can only assume that he went there looking for the car.

Q But when the Nixons saw Mr. Sorrell at Greenbriar Mall, he just ignored them?

A That's what I recall them saying.

Q Did Ms. Nixon say anything to you about Timothy arriving at their house and his jeans being wet from the knees down?

A She may have. I don't recall.

Q Is there anything else you can recall about your conversation with them about that first evening, [117] their meetings with Timothy Sorrell, that raised any suspicions on your behalf?

A Not that I can recall. I mean, there were any number of things that made us suspicious. But to give you a list or confirm that these things you are talking about did occur, I can't do that. I mean, it wasn't something that we could go out and confirm whether or not his jeans were wet. And even if we did confirm they were wet, it wouldn't tell us anything. So I mean there is some things that we didn't investigate.

Q Did there come a time when you believed you could get an indictment against Timothy Sorrell?

A That I thought I could?

Q Uh-huh.

A Yes, I suppose so. I talked to the Commonwealth's Attorney about it.

Q So you thought you had a pretty strong case against him?

A I consulted the Commonwealth's Attorney.

Q Because you thought you had a pretty strong case against him?

A To see if he wanted to prosecute him.

Q But I assume that you wouldn't suggest that you seek an indictment against somebody unless you [118] thought you had a pretty strong case against them?

A Well, I have been involved in cases that maybe it was questionable whether it was pretty strong or not, and that's the Commonwealth's Attorney's job, to determine whether or not he wants to prosecute a case.

Q Who was the Chesapeake Commonwealth's Attorney at that time?

A Robert Kowalski.

Q And you consulted with him concerning whether an indictment should be sought against Timothy Sorrell?

A Yes.

Q And your position was what?

A What do you mean?

Q Did you take a position that either an indictment should be sought or should not be sought?

A I discussed it with him. I don't recall if I told him that I thought that he should. We discussed it.

Q Did there ever come a point in time when you became frustrated that Mr. Kowalski had not indicted Timothy Sorrell?

A I don't recall that.

Q Do you know whether any of your fellow officers were frustrated that an indictment was not sought [119] against Timothy Sorrell?

A I couldn't answer that. I don't know if they were frustrated about it or not.

Q Did you testify during the sentencing phase of Coleman Gray's capital murder trial on December 6th, 1985?

A Sentencing?

Q Right.

A Yes.

Q And did you do this at the request of Suffolk Commonwealth's Attorney Phil Ferguson?

A Yes.

Q Do you remember when he made this request?

A When he made what request?

Q When he asked you to be a witness or subpoenaed you to be a witness. Well, when did you first know that you would be a witness in Coleman Gray's sentencing phase of the capital murder trial?

A I'm not sure.

Q Do you know approximately how far in advance you knew you might be a witness in that trial?

A It would be a guess. I don't recall. I mean, it may have been a month or more or it may have been less. I don't recall. I don't even recall the date of the trial.

[120] Q All right. But you knew for some appreciable length of time, something more than just a week or a few days, that Mr. Ferguson might call upon you to testify?

A Yes.

Q At that time or at any time before the sentencing hearing, did you discuss the Sorrell case with Mr. Ferguson?

A Sure did.

Q And what did you tell him about the Sorrell case?

A I couldn't tell you what I told him. He presented his questions, and I answered them as best I could. But to tell you what I told him, I don't recall.

Q Did you give him access to your investigation files?

A Yes.

Q And did he take advantage of that and look through them?

A Yes.

Q Were you there when he did that? Did you review certain things with him?

A I'm sure I did. We may have sent him some of the documents or copies of the documents may have [121] been mailed to him or one of his investigators may have come and picked them up and reviewed them while we were not present. But I'm sure we did – we were present while he viewed some of them.

Q Do you remember about how far in advance of the Coleman Gray trial that you shared all this information with Mr. Ferguson?

A No.

Q Was it before you learned that you would be a witness or that you might be a witness?

A I don't clearly recall ever thinking I may or may not be a witness until I was subpoenaed or told that I would be getting a subpoena. Usually, when you are involved in something and it is going to go to trial, you are a witness.

Q Do you know whether you shared all this information with him – well, you developed Coleman Gray as a suspect at about what time?

A I think it was about a month after – excuse me.

(Witness perusing file.)

I think it was – I think it was the latter part of June, I believe.

Q All right.

A I don't have a date, but it was, I believe, in [122] June.

Q And you know that at that time, you knew that Mr. Gray was about to stand trial on capital murder charges in Suffolk?

A He had been arrested, yes. I don't recall the trial date, but he had been arrested for those charges, yes.

Q Knowing that he was standing under these charges in Suffolk, would it be logical for us to assume that at about that time you started to share information and discuss information with the Suffolk Commonwealth's Attorney's Office and the Suffolk Police Department concerning Coleman Gray and his case?

A The first time I became aware of this was when I had looked at some photographs from Suffolk Police Department. After I looked at those photographs, I contacted them and we began to discuss Mr. Gray.

Q That was in the late part of June, you believe?

A Yes.

Q Do you remember whether you told Mr. Ferguson or anyone in his office or anyone in the police department about the Nixon's lawsuit?

A It is a possibility. I don't recall.

Q Do you have information concerning their lawsuit [123] in your investigation files?

A I would assume that there would be a note in there, at least a note on it. I'm sure that there is a letter from one of the attorneys who asked me to respond to him. He came to police headquarters and talked with me about it. So I'm certain that there is some document in there.

Q Did Mr. Ferguson or another member of his office prepare you to testify at the sentencing phase of Coleman Gray's trial?

A He discussed with me certain questions that I would be asked before I went to testify. Yes. That's normally done.

Q Did he ask you not to testify about any specific information? For example, did he ask you not to mention that Timothy Sorrell had been a suspect in the Sorrell murders?

A No, I don't recall him saying that. I mean, it was testify to the fact. Don't testify to hearsay unless it is specifically requested and ruled on. But other than that, in the context of what we were going to talk about, I don't recall any instructions.

Q Do you remember whether as a result of that preparation, you made a conscious decision to avoid [124] mentioning Timothy Sorrell and his suspect status during your testimony?

A I don't recall that, no.

Q You know that Melvin Tucker testified before you during the sentencing phase of Coleman Gray's trial?

A I believe that he did.

Q Do you know Mr. Tucker?

A Yes.

Q Have you met him before?

A Only during the – following his arrest.

Q Following his arrest, did you interview him?

A I don't recall sitting and interviewing him. I recall a conversation with his attorney. He and his attorney talked in Suffolk and then I spoke with his attorney.

Q I might be able to refresh your recollection. Again, this December 15th, 1985 Virginia Pilot article states that investigators through a defense lawyer asked Melvin Tucker about the Sorrell killings. Is that consistent with your memory?

A Would you read that again?

Q Sure. Investigators through a defense lawyer asked Melvin Tucker about the Sorrell killings.

A Yes, I'd say that was accurate.

Q Were you the investigator who through a defense [125] lawyer asked Melvin Tucker about the Sorrell killings or were you one of the investigators?

A Although that article is accurate, my recollection is that that is not what occurred exactly. The conversation was through and probably should have contained the word with his attorney. My recollection is that Mr. Tucker was in custody at the Suffolk City Jail, and his attorney, I talked with his attorney and his attorney went in the back room and talked with him and he came out and told me what he said, part of what he said. But there wasn't an interview, a direct interview between me and Mr. Tucker at that time.

Q So did you approach his defense counsel and ask him to ask Mr. Tucker whether he knew if Coleman Gray was involved in the Sorrel murders?

A No. I didn't ask him if he would ask him if he knew that he was, no.

Q What did you ask him to do?

A I asked him what involvement there was, and the attorney told me that there was an involvement based on Mr. Tucker's statement, and that Mr. Tucker would testify. He gave me a brief description of what – at that time he didn't give me a description. He told me that he would testify.

[126] Q So you asked Mr. Tucker's counsel to ask Mr. Tucker what involvement Coleman Gray had in the Sorrell murders?

A Not in those words, but knowledge or involvement, yes.

Q Were you concerned that this approach might suggest to Tucker what you were looking for and create incentive for him to fabricate a story to help him cut a deal with the Commonwealth and avoid the electric chair?

A No.

Q You didn't have any concern about that whatsoever?

A No. What I said is, my comment to him did not cause me to think that that would occur.

Q Did you ever investigate whether Tucker was involved in the Sorrell murders?

A I never had any information that he was involved in them. And I never obtained any, that he was.

Q So you did nothing to eliminate him as a suspect even though that might explain his willingness to finger Coleman Gray?

A Well, you will have to clarify your question. You have a two-prong question. I can't answer that yes or no.

[127] MR. McLEES: I object to the question. It assumes a fact not in evidence. Melvin Tucker has never been identified as a suspect in the Sorrell murder case.

THE COURT: The objection is sustained. Go to another line.

BY MR. LEE:

Q Are you familiar with the United States Supreme Court's decision in BRADY v. MARYLAND?

MR. McLEES: Objection. Whether he is or isn't, he is not – I don't see the relevance of that.

THE COURT: Sustained.

BY MR. LEE:

Q Are you aware or do you know whether in the course of an investigation, in the course of pursuing a conviction against a defendant, the police and prosecutors have a duty to reveal exculpatory evidence to the defense?

A Certainly.

Q How do you know that?

A I can't tell you how I became aware of it, but I am. If you have exculpatory evidence, it is to be given to the defense.

Q Did you have an understanding concerning what [128] Mr. Ferguson was trying to do with Mr. Tucker's testimony, your testimony, and the testimony of Dr. Pressawalla, the Medical Examiner?

A Would you say that again?

Q Did you have an understanding concerning what Mr. Ferguson was trying to do during the penalty phase of Coleman Gray's capital murder trial with Melvin

Tucker's testimony, your testimony, and the testimony of Dr. Pressawalla?

MR. McLEES: Your Honor, objection. BRADY does not depend on the good faith or bad faith of this man or the prosecutor. He either had exculpatory evidence which wasn't given to them or he did not. Whether he knows what's going on in the Suffolk case or not is just totally beside the point.

THE COURT: No, he can answer that.

BY MR. LEE:

Q Would you like me to repeat the question?

A Yes.

Q Did you have an understanding concerning what Mr. Ferguson was trying to do during the penalty phase of Coleman Gray's capital murder trial with Melvin Tucker's testimony, your testimony and the testimony of Dr. Pressawalla?

[129] A Well, I'm not certain what they were testifying to, not having been in the courtroom when they testified. I could only assume that their testimony and my testimony would agree with the others in some respect or have some – one person may have a partial knowledge of certain facts that the other person had, or a statement, or that sort of thing. But I don't know what they testified to, so I couldn't tell you what he was doing.

Q While you sat there on the stand, did you think that the jury might find it important to know that Timothy Sorrell had been a prime suspect in these murders?

A Are you asking me if I had that thought?

Q Yes.

A I don't recall.

Q It didn't make you at all uneasy that you were up there testifying in Coleman Gray's capital murder trial, obviously to convince a jury that Coleman Gray committed these murders, without letting that jury know that Timothy Sorrell had been your prime suspect for most of your investigation?

A At that time, I did not have those feelings. I had no thought in my mind at that time that Mr. Sorrell was responsible for the murders.

[130] Q So Timothy Sorrell didn't remain suspect even after the Coleman Gray trial in your mind?

A No.

Q Did you ever tell either Mr. and Mrs. Nixon or their lawyer, who I believe was Sue Ellen Keefer, after the Coleman Gray trial, that this matter wasn't resolved as to Timothy and that he still remained a suspect for you?

A No. I don't remember telling them that. Once I saw the photographs associated with the Suffolk case, I had serious doubt about Mr. Sorrell and the bit of information I obtained from that point on increased my suspicion that Mr. Gray was involved.

Q Why has Coleman Gray never been indicted for the Sorrell murders?

MR. McLEES: Objections. It is not up to him to indict.

THE COURT: Sustained.

MR. LEE: Can I ask him whether he knows why?

THE COURT: No.

BY MR. LEE:

Q Again, going back to the December 15th, 1985 article in the Virginia Pilot, I know that you mentioned earlier that you have seen it. You are [131] quoted in there –

A Would you read the article again?

Q It is a December 15th, 1985 Virginia Pilot article. And you were quoted in it as saying that this case, the Coleman Gray case, I'm sorry, the Sorrell case, will not be settled for you until it is decided in Court because, and this is your quote, "A jury and judge conviction is like a certification that you are right. Anything short of a conviction is a maybe."

Did you say that?

A I don't specifically recall it, but I wouldn't be surprised that I did.

MR. LEE: I have no further questions.

THE COURT: Mr. McLees?

MR. McLEES: Your Honor, I anticipate our cross will be somewhat lengthy. Should we break for lunch now?

THE COURT: All right. We will stop now and come back at 2 o'clock, get started with the afternoon session.

(Luncheon recess taken from 12:51 p.m. to 2:05 p.m.)

THE COURT: All right. Let's have the witness back on the stand.

[132] (Detective Slezak assumed the witness stand.)

CROSS-EXAMINATION

BY MR. McLEES:

Q Detective Slezak, this morning when Mr. Lee questioned you about a report that Timothy Sorrell had said that Lisa Sorrell was dead, as I recall your testimony, if I understand it correctly, you recalled that you believed that there was a report from the Sorrell family – excuse me, from the Nixon family, Lisa Sorrell's parents, that Timothy had made this remark.

A Yes.

Q Have you had an opportunity over the lunch break to look at some materials to refresh your recollection about another report of Lisa Sorrell's death?

A Yes.

Q Supposedly from Timothy Sorrell?

A Yes.

Q From whom did you get that information?

A Ronald Cole.

Q Was there someone else who was with him and also communicated that same information.

A Yes, Michelle Davis.

Q When was this that they made this report to you, [133] sir?

A In June of 1985.

Q June of 1985 was roughly six months after Lisa Sorrell's death?

A Yes.

Q Was there a reward offered for information leading to the arrest and conviction of the person responsible for the Sorrell murders?

A Yes.

Q How much was that, sir?

A Crime Line had a $1,000 reward and I believe the church that the Nixons or the Sorrells went to offered, I believe, $10,000 in addition to that.

Q Had those rewards been publicized?

A Yes, they had.

Q Now, who were Michelle Davis and Ronald Cole?

A They were two individuals, a boyfriend and girlfriend, who lived in Cavalier Manor in the same neighborhood that the Sorrells lived in.

Q The same neighborhood that Timothy and Lisa Sorrell lived in?

A Yes.

Q I see. And how did they happen to come to you?

A One of the officers who knew a relative of Michelle Davis told us about them. I asked him to [134]

bring them to headquarters. They came in, we were introduced, and we interviewed them at that time.

Q And in those interviews, what in substance did they say with respect to the Sorrell murders?

A They said that they had been to a party on December 4th, and it was at the Sorrell house.

Q That's the day before the evening of the Sorrell murders?

A Yes.

Q Go ahead.

A That they were there. There were several people who were drug dealers also there.

Q Excuse me again, where was this party, supposedly?

A At the Sorrell house.

Q Timothy and Lisa Sorrell's house?

A Yes.

Q Go ahead.

A They had conversations with people there. They described the interior of the house. During the course of the evening, according to Ms. Davis and Mr. Cole, an individual took Lisa Sorrell into a bedroom, came out, and told Timothy Sorrell, laughing, that he had had intercourse with his wife and began to ridicule him. While they were there, several of the [135] individuals displayed a firearm. Mr. Cole said that – described the weapon as a .357 or a weapon which had a clip placed in the handle of it.

Q What about it was that specifically that he was describing?

A A weapon that they had at the house.

Q That who had at the house?

A One of the individuals in the house.

Q I see. Go ahead.

A Mr. Cole described it as a .357 or describing an automatic. Or Michelle Davis described it as a .357 and the other person described it as an automatic. I don't recall which. During that time there was a conversation that he overheard an individual there telling Mr. – or Mr. Sorrell discussing with him killing his wife.

Q What did they say that Mr. Sorrell said?

A Said that he had had a discussion with this individual about killing his wife.

Q I see.

A I don't believe that they had great details. Only that he wanted her killed.

We had several interviews with them. We discussed the kind of cars that they had and that sort of thing. When asked to describe the car that [136] she drove –

Q That who drove?

A Lisa Sorrell drove.

Q I see. Go ahead.

A He said that the car was at the house and it was a white car, small white car.

Q Was that an accurate description of Lisa Sorrell's car?

A No.

Q Go ahead.

A As the interviews with them continued, Sergeant Harrison and myself asked Michelle Davis and Ronald Cole to show us the house that this party took place at. They went, I believe, in the 800 block of Taft Road and described the house, pointed to a house that was in the 800 block. The Sorrells lived in the 900 block.

MR. LEE: Your Honor, I object right now. I have been waiting patiently, I thought that this was going to be something that was in the scope of my direct examination. I don't understand how it is and I don't know where it is going and I think this – I don't know what it is at all except I don't think it is in the scope of my direct examination.

THE COURT: Overruled.

[137] BY MR. McLEES:

Q Go ahead.

A The house that they described was on the opposite side of the street. The Sorrell house, in the back yard, there was a railroad track and then an expanse of undeveloped land. The house that they described had the rest of the housing project behind it. It was clear at that time –

Q Excuse me, the house that they pointed out, did it resemble the Sorrell house at all?

A Well, most of the houses there are basically two styles. It is a left design or a right design. And the house would have an attached garage or not have one.

Q With respect to its situation, its surroundings and that sort of thing, did it resemble the Sorrell house?

A It is the same style house.

Q The same style. But the Sorrell house had a railroad behind it and the other house had what behind it?

A The rest of the housing project.

Q Was it on the same side of the street?

A Opposite side of the street.

Q And this is in their own neighborhood?

[138] A Yes.

Q Did Cole or Davis report to you anything else that Sorrell had supposedly said to them after this party, after December 5th?

A Yes.

Q What was that?

A Mr. Cole said that he went to Greenbriar Mall and saw Mr. Sorrell there. He said as he saw him in the distance, he heard a gunshot. And Mr. Sorrell told him that he had just shot at Lisa's car.

Q And did when did this supposedly occur?

A December 5th, the day after the party at Mr. Sorrell's house.

Q At what time of day?

A I believe it was in the early afternoon.

Q The early afternoon of December 5th?

A Yes.

Q The day she was murdered.

A Yes.

Q Or disappeared. And this supposedly occurred at Greenbriar Mall?

A Yes.

Q I see. Did those facts comport with the facts you learned through your independent investigation of the Sorrell disappearance and the Sorrell murders?

[139] A I'm sorry, repeat the question.

Q Through your independent investigation, when had you learned that Lisa Sorrell was last seen alive?

A She was last seen alive about 4:30 on December 5th.

Q In the afternoon?

A Yes. Late afternoon.

Q And where were the bodies found, were they found at Greenbriar Mall?

A No.

Q Where were they found?

A They were found off Dahlberry Road on Cook's Mill Road. It is an unpaved road.

Q Now, you had explained that the car didn't match, the facts surrounding the shooting didn't match, and the house that they identified where they supposedly went to the Sorrell's house for the party didn't match.

A That's correct.

Q Were there any other difficulties or discrepancies – excuse me, and the descriptions of the guns didn't match. Were there any other discrepancies in these people's reports that you were able to detect and investigate?

A Yes, sir. Mr. Cole came in a few days later and [140] stated that – stated that the statement he had given us was a lie.

Q Did you question him about that?

A Briefly. I didn't go into the reasons that he would make the statement. It was a very brief discussion.

Q And have you or the other Chesapeake Police interviewed any of the people who were supposedly present at this party where they said that Timothy Sorrell made these incriminating statements?

A Yes.

Q What if anything did you learn from them?

A We went to the penitentiary and talked to a gentleman whose last name was Riddick. We asked him if he had been to a party in December of that year in Cavalier Manor. He said he had. We asked if there was a woman and a child there, and he said there was a woman and child there, along with some other people. We asked if there was a description of a gun there – asked him to

describe a gun, if anyone had one there. And he described a person having a .357. When asked if Tim Sorrell and Lisa Sorrell was there, he did not identify them as being there.

Q And this was one of the people who Cole and Davis had identified as being present at the [141] Sorrell's house?

A Yes, sir.

Q I see.

A Other individuals we talked to were not cooperative about it.

Q They wouldn't give you any information at all?

A Yes, sir. They just didn't want to talk to us.

Q I see. Is that unusual in investigating a criminal case in Chesapeake?

A No, sir.

THE COURT: Let me stop you just a moment. When Cole came in and indicated that he had lied, did he repudiate the entirety of the story or just the Greenbriar Mall part of it?

THE WITNESS: I can't tell you exactly what he said, Your Honor, but it was apparent to me that his statement in general was a lie. It was a fabrication.

THE COURT: Go ahead.

BY MR. McLEES:

Q Now, on direct examination, when you were testifying about developing Coleman Gray as a suspect in the

Sorrell murders, you told Mr. Lee and His Honor that you had looked at photographs from the Suffolk Police Department.

[142] A Yes, sir.

Q That was prior to the beginning of your development of Mr. Gray as a suspect.

A Yes, sir.

Q What photographs? Just in general, would you describe who those photographs depicted; what was the subject matter of them?

A They were Xerox copies of the photographs that they had taken of the victim.

Q That is, Mr. McClelland?

A Yes.

Q The Suffolk victim.

A Yes. And the interior of Mr. McClelland's car.

Q Which showed what?

A Which showed damage from a fire. The thing that stuck out in my mind was a match on the floorboard. We found a match inside the Sorrell vehicle. There was paper scattered inside and burned. The damage to the two cars were very similar. I showed the Xerox copies of Mr. McClelland's vehicle to the officer who had photographed and processed the Sorrell's car, and it was a few moments before he realized that they were not pictures of the Sorrell case.

Q Now, of course the – in the Chesapeake case, in the Sorrell case, you personally examined the [143] vehicle in which Lisa and Shanta were found, did you not?

A Yes, I did.

Q What had burned inside the vehicle?

A Paper, plastic bags, the visor on the car had melted down. There was – the plastic and vinyl inside the car burned.

Q What had started the fire?

A Apparently paper.

Q Was there any indication of accelerants used, that is, gasoline, kerosene, explosive?

A No, sir.

Q Now, in the Suffolk case, the McClelland murder, your understanding is that there were accelerants used there, or not?

A That's my understanding.

Q Gasoline or something of that nature?

A Gasoline.

Q Now, when you examined the Sorrell vehicle on the outside, what if anything – what did you detect unusual about the door handles on the exterior of the car?

A Portions of the exterior of the car were painted, were sprayed over with what appeared to be a flat black spray paint.

[144] Q For what apparent purpose?

A I believe it – the areas that were painted were areas of the car that a person would come in contact if they were opening doors or closing trunks, the trunk and that sort of thing.

Q To cover up whatever fingerprints might have been left?

A Yes.

Q Now, when a person plans a crime ahead of time, what precautions, in your experience, are likely to be taken if the person wants to be sure not to leave fingerprints behind?

A They wear gloves.

Q Is it your understanding that there were any identifiable fingerprints found in the McClelland vehicle in Suffolk?

A I don't believe so.

Q Do you have any knowledge that there was spray paint on the McClelland car?

A I don't think so.

Q So the person committing the Sorrell murders sprayed – felt they had to spray the handles of the door to cover up the fingerprints?

A Yes, sir.

Q The person committing the McClelland murder did [145] not.

A That's what I would assume, yes.

Q The person committing the Sorrell murders when they tried to set the interior of the car on fire, they didn't have any equipment to spread the fire around, any accelerants, any special equipment that we know of.

A Just paper.

Q The person committing the Suffolk murder, the McClelland murder, did?

A Yes.

Q The Sorrell murder was committed in December of 1984, wasn't it?

A Sorrell was, yes.

Q And the McClelland murder came in May of 1985?

A That's right.

Q With a serial killer, Detective Slezak, is it unusual in your experience for them to develop expertise and improve their methods of committing crimes and avoiding detection as they repeat their crime?

A I would expect that.

Q Is that unusual or is that something you would expect?

A No, I would expect somebody to do that.

[146] Q Very good, sir. Now, have you heard of Keith Godwin?

A Yes, sir.

MR. LEE: Your Honor, I object again. This is completely beyond the scope of my direct examination,

and as I understood your statement earlier today, we were here to find out whether adequate notice was given, whether adequate cross-examination was permitted and whether exculpatory evidence was withheld. Now Mr. McLees is trying to retry the Sorrell case.

THE COURT: I'll let Mr. McLees go ahead.

BY MR. McLEES:

Q Your Honor, I ask that the Marshal show Detective Slezak Respondent's Exhibit I from the book of Respondent's exhibits.

(Document proffered to witness.)

Have you ever seen that before?

A Yes, sir, I have.

Q What is that?

A It is a copy of a transcript of an interview with Keith Godwin.

Q By whom, sir?

A I believe it is Detective Bunker.

Q Of Suffolk Police Department?

[147] A Wally Bunker, I believe.

Q It is dated June 8th, 1985; is that right?

A Yes, sir.

Q Were you made aware of that or given a copy of that during your investigation of the Sorrell case?

A Yes, sir.

Q Approximately when did you learn of that statement from Mr. Godwin?

A I couldn't tell you specifically, but I feel confident that it was shortly after Suffolk received it.

Q So it would have been in the month of June, 1985?

A Oh, yes.

Q Have you read that statement in the past?

A Yes, sir, I have.

Q In general, it basically says that Coleman Gray told Keith Godwin that he committed the Sorrell murders, doesn't it?

A Yes.

Q And in Gray's statement to Godwin, it goes into considerable detail about how it happened, how he met them and what he did with them, doesn't it?

A In which statement?

Q In Gray's statement to Keith Godwin, which Keith [148] Godwin repeats in that statement to Detective Bunker.

A Oh, yes, sir, it does. It does contain details of what took place.

Q And it goes into some detail as far as Gray's comments about his present status, why he was in the Suffolk lockup that day?

A Yes, sir.

Q And how they had instituted the McClelland prosecution against him?

A Yes, sir.

Q And the fact that his wife was involved?

A Yes, sir.

Q And the fact that the only hard evidence they had to connect him with the McClelland murder was Melvin Tucker's testimony?

A Yes, sir.

Q Did this statement from Mr. Godwin enter into your calculation of how you should investigate the Sorrell murders from that point forward?

A Very much.

Q How did that influence you, sir?

A We had an occasion to talk with Mr. Godwin's attorney, Bruce Kushner. Mr. Kushner said that he had talked with his client at length and that he had [149] information that would be instrumental in clearing the Sorrell homicides.

Q And did you speak with Mr. Godwin? Or did you just read the statement?

A I have spoken with him, but in the context, there is no additional information other than what's contained in these documents.

Q Now, did you then at some point shortly thereafter contact Mr. Gray in the course of the Sorrell investigation?

A Yes. I did.

Q And in substance, what did you say to him?

A After looking at the photographs and then finding out about this, I wanted to – an opportunity to interrogate him that morning. I went to either Newport News or Hampton Jail, where he was being held. And I talked with him, and I told him a lie, in that we were getting ready to try Mr. Sorrell.

Q Timothy Sorrell?

A Yes. And that Mr. Gray, the possibility of evidence existed that Mr. Gray would interfere with the prosecution.

Q How was that? What did you mean by that?

A Well, the evidence that was available at that [150] point would make anyone think that he was – that Mr. Gray was involved in the Sorrell case. So I told him that we needed his assistance in clearing up these matters in an attempt to get him over to interrogate him.

Q I see. Now, at that point, did you have any hard evidence that Timothy Sorrell was involved in the murder of Lisa and Shanta Sorrell?

A No.

Q Go ahead, sir. What else, what transpired in your conversations with Mr. Gray?

A Mr. Gray came over and he denied any involvement in the Sorrell cases. We did not discuss the McClelland murder. I wanted him to feel comfortable talking to me and I didn't want him to think that I was attempting to implicate him. When I became aware that he was not

going to admit to the case, and I had gotten what information I thought we could have that we would get, I asked him to submit to fingerprints so that we could compare his fingerprints to the partial fingerprints that we had found at the scene of the Sorrell murders.

Q Did you have any identifiable fingerprints from the Sorrell murder scene?

A No, sir.

[151] Q But you told him you had?

A I told him we did. But we did not.

Q Go ahead.

A He agreed, gave us the fingerprints, and while I was talking with him, I told one of the other officers to come down to the room in 20 or 30 minutes or whatever and tell me that the ID tech wanted to see me. I just told him to go along with whatever plan we had. He came down and I balled [sic] him out for interrupting us.

Q This is while you were talking to Mr. Gray?

A Yes, sir.

Q Go ahead.

A I told him to wait, and he insisted that I go down to the laboratory. I apologized to Mr. Gray, I left and went down to where the technician was, and I waited there for 15 minutes or so, came back in and told Mr. Gray that out of 18 partial fingerprints, they had matched one of his fingerprints.

Q Was that true, sir?

A No. It was not true.

Q At that point, who in this world knew what you had told Coleman Gray?

A Just Mr. Gray and myself.

Q None of the other police detectives?

[152] A No.

Q No evidence technicians?

A No.

Q Just the two of you.

A Just the two of us.

Q Go ahead. What did you say then? Or what did he say?

A Well, he denied any involvement. We had talked about what the possibilities were of whose prints it could be.

Q Had you asked him before this if there was any innocent – any possible innocent explanation for his fingerprints being on anything in the Sorrell car?

A Yes. We had discussed whether or not he had worked at any Honda dealerships, if he had worked for the assembly plant or had anything to do with any part of assembly. He said that he didn't think fingerprints would be in there and that he didn't work for any of those places; that his fingerprints wouldn't be there.

Q There was no way his fingerprints would be in the Sorrell car?

A That's correct.

Q Go ahead. When you told him about the 18 prints [153] and the one that was his, what happened next?

A He denied it and said that he didn't have anything to do with the murder. I told him that I really didn't have any other questions for him, that I just wanted to know whether or not he had put the child in the trunk to save her or if it was to make her die slowly.

Q What was his reaction to that?

A He hung his head for an extended period of time without comment. Finally, he said, "You know, I didn't do it." I then took him to the Chesapeake City Jail, and he was there for several days. The Sheriff's Department returned him to either Newport News or Hampton.

Approximately –

Q Now, let me ask you this: After that conversation, did you tell anybody else about what you had told Mr. Gray about the 18 prints and the one identified as his?

A No, sir.

Q Go ahead, sir. Did you ever hear that report again?

A Yes.

Q How did that come about?

A I was contacted by Mr. Kowalski, the [154] Commonwealth's Attorney, and he told me that he had received a letter from an inmate named Larabee Farrell. In the letter which I read, Mr. Farrell said that he heard

Mr. Gray talking to another inmate, and during that time, Mr. Gray had said, made comments that implicated him as the murderer in the Sorrell homicides. Subsequently, we interviewed Mr. Farrell, and in Mr. Kowalski's office, while he was telling us the details, Mr. Farrell said that the conversation he had between himself and Mr. Gray, Mr. Gray said he – let me back up. Mr. Farrell quoted Mr. Gray as saying that the police department had 18 partial fingerprints that were found in the car, and only one of them matched him; that he wasn't worried about it. Mr. Farrell was quoted or quotes himself as saying, "You dumb ass, how many do you think they need?" At that point, Mr. Gray remarked, "I guess I touched the owner's manual when I went through the glove box."

Q Detective Slezak, had you told Larabee Farrell about what you had told Coleman Gray about the 18 prints and the one?

A No, sir.

Q Who is the only other person in the world he could have heard that from?

[155] A Mr. Gray.

Q Now, at that point, in your mind who was responsible for the Sorrell murders?

A Mr. Gray.

Q In your mind; at the time of trial, who was responsible for it?

A Mr. Gray.

Q In your mind today, who is responsible for it?

A Mr. Gray.

Q Have you ever had any hard evidence to connect Timothy Sorrell or anybody else with the Sorrell murders?

A No, sir.

Q For that matter, do you know whether Timothy Sorrell might have been involved in some way, perhaps hiring Mr. Gray to commit the Sorrell murder?

A It is a possibility.

Q Do you have any evidence?

A No, sir.

Q Or any live, credible leads that would be investigated that would have a prospect of leading to hard evidence to connect Timothy Sorrell or anybody else with the Sorrell murder?

A No, sir.

MR. McLEES: Thank you, detective. I have [156] nothing further right now.

THE COURT: Anything else for this witness?

MR. LEE: Yes. May I have a moment, Your Honor?

THE COURT: Sure.

MR. LEE: Your Honor, before I do my redirect examination, I'd like to move to examine the statements that Detective Slezak reviewed prior to testifying, the documents he says that he reviewed on our break,

because he used them to refresh his recollection and because I think I'm entitled to them under Rule 612 of the Federal Rules of Evidence so that I can effectively cross-examine him.

THE COURT: Give him what you reviewed during the break.

(Documents proffered to counsel.)

Do you need a few minutes?

MR. LEE: I think I do, Your Honor.

THE COURT: I'll give you ten minutes.

(Recess taken from 2:42 p.m. to 2:52 p.m.)

THE COURT: All right. Mr. Lee?

REDIRECT EXAMINATION

BY MR. LEE:

Q Detective Slezak, I have had an opportunity to read the things that you gave to me, the things that [157] you reviewed during our lunch break.

A Yes, sir.

Q Did you read this stuff carefully during the lunch break to refresh your recollection?

A I read part of it very carefully and the rest of it I scanned over.

Q Which parts did you read carefully and what did you scan over?

A Regarding a statement about Mr. Sorrell's statement to Mr. Cole about the mall and at the house.

Q And did you review Ms. Davis' statement, Valerie Davis' statement?

A The written one?

Q Yes.

A Yes, sir, I read that.

Q Okay. I'd like you to read it for the Court.

A You want me to read the whole statement?

Q Please.

A "On October 17th, 1984 my boyfriend, Ronald L. Cole, introduced me to Tim Sorrell and Lisa Sorrell. On this day we was over at their house as they were having a party. Terrence Riddick was present and he had told me that over $200 was stolen from him and he believed Lisa had taken it because the night before, [158] he had went to bed with her. Michael Benjamin and Tim would always go into the garage which was changed into a den and discuss things which they would always tell me was their private conversations. That night I left early. On December 4th, 1984, that night I also visited the Sorrell house. Mike Benjamin, my boyfriend, Tim, Lisa, and – I don't know what this says – some other people was present. They were talking about guns and telling what kind they had. Tim, a guy by the name of Lairt (phonetic) and Mike Benjamin all had .32's."

Q .32's?

A That's what it says. .32's. The bottom of it is – you can't read it. "Did I want to go to the mall with her and I said no, because I had to be home at 11. But I asked her could I keep Shanta and she said that was okay. Lisa went to her bedroom about 8:30 and did not return back out so I left about 10:30 that night. They also was drinking. The next day, which was December 5th, 1984, I left and went over to my sister's house early that morning and returned late that night. Cheryl, Ronald's sister, opened the door for me. I was there about 15 minutes when Tim and Mike Benjamin arrived. Tim didn't want to talk in front of me, so he asked me to leave, but [159] Ronald said that I could hear and that's when he began to tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire.

"After he had talked –" the bottom line is not – I can't read it. "The next day, Ronald didn't remember what had happened that night and barely remembered what had happened that day, because he had been drinking. He said that Tim met him at the convenience store and told him to meet him at Greenbriar because he was doing something. So Ronald figured it was drugs, and he did. When Ronald arrived, he heard a gunshot and saw Tim coming towards him. Tim said he had just shot at the car. Ronald asked him what he was doing and Tim said that was okay, he had already done it. The type of gun was a .32 that he said – the type of gun was a .32 that he said his wife was shot with. And when Tim and Mike came to the house and discussed what had happened to his wife and daughter, he was at Ronald's mother's house in Cavalier."

"I asked Tim that night that he talk to Ronald. Was he present when his wife and daughter was killed, and his answer to me was none of my business.

"On the night Tim was over at Ronald's house, I [160] also asked him why would someone – I don't know the word – put the baby in the trunk and Tim said because they probably figured the baby would cry and someone would come and open the trunk and let the baby out. These statements are made about Tim and Lisa Sorrell by Tim Sorrell on Wednesday night about 12:40 a.m., the night Lisa and Shanta was killed. This was about a day after I saw Lisa Sorrell." It is signed by Ms. Davis.

Q Thank you. During cross-examination, you were very careful to tell us about conversations about and viewings of .357's or other automatic weapons but you didn't tell us anything about conversations about .32's. Why didn't you tell us about that stuff if it is in the statement?

A I was talking about the interviews that I had with them. This statement does say a .32. But I was talking about statements that they made to us.

Q You refreshed your recollection about these interviews during the lunch break by reviewing these statements.

A Yes, sir.

Q So what you are saying is they told you something different, but in writing, they said .32's?

[161] A Her statement says .32 here. The interviews that we had with them, one of them described .357's, and I think that was Ronald Cole. Valerie Davis described a

weapon by describing putting a clip in the bottom or putting a magazine in the bottom of the gun.

Q Didn't you think it might be important to the Court and to me and to Mr. McLees to know about the information about the .32's in that statement?

A If I was aware that the .32 was in there, I would have said it. I read this statement. I did not read this entire statement. The question that I was reading in here dealt later on with his statement at the mall, not at the beginning of it. I had already, in talking to them, knew that it was a false statement. My purpose in reading it wasn't to read the whole thing, it was to read that part about the mall.

Q So you just missed that stuff about the .32's.

A Yes, sir. That's exactly what it was.

Q Could I hand you this interview of Ronald Cole taped by video 6-10-85 by Detectives Slezak and Officer William L. Spruill. I'd like to refer the detective to pages nine and ten. And there is some colloquy about a gun starting about two-thirds of the [162] way down. Maybe you can read that for us.

A What he was doing?

Q Just if you could read, there is some testimony in there. There is some statements about a gun that I believe Timothy Sorrell may have been in possession of. It starts with a question.

A "Have you ever seen Tim Sorrell with a gun?"

Q Yes.

A Well – he couldn't understand the answer.

Slezak: Where were you when you saw him?

Cole: On the street. On the corner of Darren and Cavalier.

Slezak: Cavalier and what?

Michelle: Darren.

Slezak: Okay, what was he doing with the gun?

Cole: I don't know. He just had it. Just like, that's all I know.

Slezak: Tucked in his front, front of his pants?

Cole: Uh-huh.

Slezak: What kind of gun was it?

Cole: To be honest about it, right offhand, I couldn't tell you about no gun.

Slezak: Was it an automatic or a revolver?

Cole: See, all he did was like this, and he [163] pulled his shirt over it so nobody could see it so I, you know –

Slezak: What color was it?

Cole: Let's see, I know the color of the handle was –

Slezak: What color was it?

Cole: The handle was brown. It was brown.

Slezak: Okay.

Cole: But I ain't going to say it was his because a friend of him was out there so he might have left him – might have let him see it or something.

Slezak: Did – yeah. Could you have been – could it have been something other than the gun?

Cole: Not with a handle like that. I don't mean no harm. I mean, unless he carved it. I doubt that seriously.

Q That's probably enough. We don't need to go through the whole thing. During the break, I didn't have time to read that entire statement carefully. But maybe you can point to the parts of it where they talk about the .357's and the automatic weapons.

A No, this is – this statement, there is more than one statement on Ronald Cole. The question to [164] me was what statements did I read during the break. I read part of this statement, and I think there is another typewritten statement that I read part of.

Q There is an interview of Cheryl Cole. I'm not sure who Cheryl Cole is.

A I think it is his sister.

Q Okay.

A But I testified that I didn't read them in their entirety.

Q So your testimony is based on recollections that – it is based on refreshed memory after reviewing these in some – well, I don't understand exactly what you are saying. Are you saying that reading these prompted

memories of these discussions about the .357's and the automatics and other things?

A I'm not sure I understand your question.

Q I'm not sure I understand how during the break you regained these memories of these discussions about the guns, and that there were .357's and automatics and not .32's.

A The papers that I read in part were these. There is a stack. I was also given this stack of paper which I didn't read. I didn't have time to read the whole stack. I didn't read these.

Q During the break you mean?

[165] A Yes. So when I was asked to give you the papers that I looked at, I took those off that I had read through. I did not read them in their entirety. I read those things during the break regarding a statement that was made by Mr. Sorrell. That's what I was looking for in the statement. I recall talking with Mr. Cole and Michelle Davis about the description of the guns that they had. When I looked at this statement, I did not read it in its entirety. If it had been something that was presented as being truthful, I probably would have remembered every detail. But this statement and these other typed statements, the people that were telling me about it told me that it wasn't true. I haven't committed those things to memory. There are parts of them that I do vividly remember and there are other parts that I don't. I recognize that it was a statement that was given to me, and then I was told that it was not accurate.

Q I believe you said during cross-examination that one of your officers who knew Valerie Davis told you that they had information they would like to pass on to you.

A That Valerie Davis and Mr. Cole had information.

[166] Q Do you know whether Valerie Davis and Mr. Cole ever made a claim on this reward that you referred to earlier?

A I don't think they claimed it. I would have known if it had been awarded. But I don't think they made a claim to it.

Q Okay. Now, Ronald Cole told you that he heard Timothy Sorrell say, "I'm going to kill my wife"?

A No, Ronald Cole said that, in his statement, that he went to the mall and that Tim shot at him – shot at the car. At the house, he said that he heard a conversation between Mr. Sorrell and another individual that he wanted his wife killed. Now, it wasn't clear from his statement whether he wanted to do it or whether he wanted someone to do it. Or whether he intended to do it or he intended for someone else. I suppose you could conclude either way.

Q I suppose you could. And he said he saw Timothy Sorrell at the Greenbriar Mall and he said he heard a shot and Timothy Sorrell said, "I just shot at my wife's car."

A Yes.

Q And then later, Mr. Cole came to you and repudiated his statement?

[167] A Yes.

Q And you had a very brief discussion with him about that.

A Yes.

Q Very, very brief.

A Yes.

Q Did you ask him whether anyone had threatened or intimidated him?

A I did.

Q He said?

A He said that he had not been threatened.

Q If he had been, he had taken that threat seriously, would you have expected him to tell you about that?

A I don't understand.

Q Is this a common – do you have a common problem with witnesses down in the Tidewater area who refuse to or are unwilling to testify or to talk to you because they fear for their lives?

A Yes, it does occur. Now, Mr. Cole was assaulted after he – during the course of an interview with us, he told me that he was assaulted.

Q And Mr. Cole never said anything to you about Coleman Gray having committed this crime, did he?

A Never.

[168] Q Did Valerie Davis ever come to you and repudiate her statement?

A She was with Mr. Cole.

Q And she said to you "I repudiate my statement, also"?

A I don't think so. But the conversation, you know, he said that "We made up the story," that "It is not true." In those words or words very similar to them. But they were together but I don't know that Michelle Davis made a statement using the same words herself. She was present when it was made.

Q Did you speak with each of them separately?

A No, I spoke with them very briefly together.

Q And that was enough to convince you that there was nothing further to pursue concerning their statements?

A Well, I had already talked to some of the witnesses who said that the information they had was not correct. They identified a car that Ms. Sorrell did not have. They picked the wrong house. And then they told me that they were lying about it.

Q They picked the wrong house, but a house that looked like the Sorrell's house?

A Well, it was – the floorplan was very similar.

[169] Q I'm sorry, in response to Mr. McLees's questioning I thought you meant that the outside looked like it.

A It looks the same. Whether the color is the same or not, I don't recall. But the floorplan and the general appearance of the outside of the house is very, very

similar. It may be exactly the same. But it is obvious that it is not that house. They are on opposite sides of the street and the surroundings of the house are totally different.

Q Do you know whether they were doing drugs the night that they were talking about?

A Mr. Cole and Ms. Davis?

Q Yes.

A Mr. Cole said that they were.

Q 32 holds how many bullets?

A I guess it depends on the manufacturer. There are .32 single shots. You don't see very many of them. Probably most that you would see are going to be five or six shots.

Q Is it unusual in an execution-style murder for the killer to empty the weapon into the victim?

A Is it unusual?

Q Uh-huh.

A Using a revolver?

[170] Q Using a revolver. Or an automatic.

A Yeah, I would say that it occurs less frequently than a single shot.

Q Now, I understand it may occur less frequently. I'm talking about unusual.

A What is unusual?

Q Do you see those kinds of homicides down in the Tidewater area on a regular basis?

A I've seen two like this.

Q Is it unusual for a criminal to attempt to dispose of evidence?

A Unusual? No, sir.

Q Is it – do they sometimes do that by trying to burn it?

A Yes.

Q Have you seen burned vehicles in other cases?

A Yes.

Q Now, you were speaking about your interrogation of Mr. Gray, or your conversation with Mr. Gray. When you made up this story and told him a lie and then got it all rolling with the story about the ID man. Now, during all of that, your intent was to lead him to believe that you had evidence to inculpate him in the Sorrell murders; is that right?

A My intent in talking to him was to see if I [171] could get any information that I would be able to investigate. if the conversation with him would give me some leads as to what was taking place. I did not expect him to admit it, no. And when through the course of the interview he would tell me little things about whether he was driving his car that day or whether his wife was driving it, that was the type of information that I needed to check and see if I could verify it. In addition, I was hoping to give him some information that no one else had in hopes

that if he went – when he returned to jail, that if he said something to an inmate there, I would know whether or not he had in fact talked to an inmate.

Q So you expected him to just leave and go tell some inmate that he was suspected of these murders?

A No. I was hoping he would. And I knew that no one else knew that information so that if somebody did come to me and relay that information, then I would know that they did at least have the conversation.

Q Might not Coleman Gray have gone and said to somebody, "They questioned me about these Sorrell murders. They say there was one partial print out of 18 that they took"?

A It is possible.

[172] Q Couldn't a snitch take the story from there?

A He could.

Q That's what you said Larabee Farrell said that Coleman Gray talked about it, talked about the prints.

A Yes.

Q But it sounds like during your conversation with Mr. Gray, he was cooperative. He gave his prints and talked to you.

A Yes.

Q Did you have any other conversations with Mr. Gray during the course of your investigation?

A I talked to him in Newport News. I talked to him at the jail. I read him his rights and he didn't like one of

the statements. He didn't like the fact that the form had the word statement in it, so we just spoke briefly and I didn't talk to him that day. We were supposed to talk to him the following day. There was a power failure. So I talked to him on that occasion about generally what had happened and his wife was at the police station. I tried to talk with her, she would not talk to us. Then the last interview, the last interview that I had with him was this statement that we just discussed.

Q Your last interview was the one where you talked [173] about the prints?

A With Mr. Gray. Yes.

Q Do you know about when that conversation occurred?

A I would have to look through the file.

Q Do you know approximately?

A It was in July, I believe. July of 1985.

Q Did any other of your detectives speak with Mr. Gray during the course of all of this?

A I think if I might go back a minute, I think I may have talked to Mr. Gray one other time. I believe I may have. I don't know, it seems to me like it was in four or five or six months later I may have had another discussion with him. I'm not certain about that. But I believe that I did. Getting back to your last question, Sergeant Harrison was with me when we spoke with him briefly in Newport News or Hampton Jail, whichever.

Q Did anyone else ever speak with him, any of your other detectives?

A I don't think so.

Q Do you know whether you or Mr. Harrison or anyone in the Suffolk Police Department ever told Mr. Gray that there were inmates willing to testify that he was involved in the Sorrell murders?

[174] A I think that I had a discussion with him. I think that I did.

Q So you may have told him about Keith Godwin and Larabee Farrell and Melvin Tucker?

A I don't recall if I mentioned them by name. I may have said that there were some people who implicated him or something like that. I don't recall, and I really can't imagine me telling him, naming the people by name. I don't know any reason why I would have done that. It is possible, but I don't think I did.

MR. LEE: May I return to counsel table for a minute?

THE COURT: Yes.

(Counsel retrieving documents.)

MR. LEE: I need to show him the book of Respondent's exhibits.

BY MR. LEE:

Q I'd like you to turn to Exhibit I in Respondent's exhibit book.

Do you recognize that document?

A This is a statement taken between Mr. Gray and Wally Bunker.

Q Do you know Wally Bunker?

A Yes.

[175] Q Who is he?

A He is a police officer for the City of Suffolk.

Q Have you reviewed this in connection with your testimony today, this statement?

A I have looked at a portion of it. The portion that I had read from this recently was the portion that deals with Mr. Godwin's statement to – his statement about the Sorrells. The other statement dealing with McClelland, I didn't read.

Q You have mentioned Mr. Godwin a couple of times during cross-examination and we have talked about him a little bit now. And you have told us that Mr. Godwin's statement was some of the best evidence that you had against Coleman Gray.

A I don't know whether I said it was the best evidence. It certainly had an impact on me, yes.

Q Do you remember – let me ask you some questions about the statement about Keith Godwin. Have you met Keith Godwin before?

A No.

Q You never had an opportunity yourself to interview Mr. Godwin?

A No. I don't ever remember interviewing Mr. Godwin.

Q While you were investigating the Sorrell murders [176] and once you became interested in the McClelland

murders, I assume you made yourself very familiar with the facts of the McClelland case?

A No, sir, I didn't make myself familiar with the McClelland case. I looked at their evidence associated with the crime scene and I looked at photographs and possibly inventories, and the statement hereby Mr. Godwin. I didn't sit down and read through all of their paperwork. I mean, I went there and spoke with the detectives, asked them, you know, what information they had that would be associated with our case. But I haven't reviewed their case in its entirety. There is a great deal of information in that case that wouldn't be pertinent to ours.

Q Since Mr. Godwin was important to the prosecution of, or the potential prosecution of the Sorrell murders, I assume you were concerned with whether his statement was truthful?

A Certainly.

Q Did you notice when you reviewed his statement that nearly all of the facts were facts he could have culled from the newspaper reports about the McClelland and the Sorrell murders?

MR. McLEES: Objection. That assumes a [177] fact not in evidence. No one has testified to that.

THE COURT: He can answer it.

BY MR. LEE:

Q Were you familiar with the newspaper reports about the Sorrell murders and McClelland murders?

A Yes.

Q Do you remember after reviewing the Godwin statement ever having the impression that most of these facts were public facts made public through the news media?

A Yes. The vast majority of the information was available through the news media.

Q Do you know whether jailhouse snitches often fabricate their stories using newspapers?

A I would say that they could. I think it would be reasonable that some do.

Q Do you remember when you reviewed Mr. – either in connection with today's hearing or back when you were doing the investigation, do you remember noticing in Mr. Godwin's statement that he said that Mr. Gray, Mr. Tucker and Mr. Gray's wife were involved in the actual abduction of Mr. McClelland and that Mr. Gray used the .32, Mr. Tucker used the .25, and Melinda Gray used a knife?

A I'm not familiar with that aspect of the case. [178] I wasn't interested in all those details of his statement. The thing that came out and was important to me was Mr. Godwin's statement associated with the Sorrells.

Q So you didn't know that the evidence in the McClelland case was that Melinda Gray wasn't involved in the actual abduction?

A I wasn't aware that anyone had made a statement that Melinda Gray had a knife. That's something that I don't recall. That's new to me. And the fact that she

wasn't involved in the abduction, my understanding is that she was not a participant in that. But that's the first time that I recall hearing anything about the knife and Melinda Gray.

Q Did anyone ever tell you in conversations you may have had about Mr. Godwin that he had committed so many robberies in the Tidewater area that not only was he facing a lengthy prison sentence but that he would be ineligible for parole under the habitual offender statute?

A Yes.

Q Did that concern you regarding whether he may have fabricated his statement?

A Yes.

Q Do you know whether Mr. Godwin testified during [179] the sentencing phase of Coleman Gray's capital murder trial?

A I think he did not.

Q So he decided not to testify to the best of your knowledge?

A To the best of my knowledge, he did not testify.

Q Now, as I understand it, you had the statement of Larabee Farrell and you had the statement of Keith Godwin, the statement of Melvin Tucker implicating Coleman Gray in the Sorrell murders.

A Yes, sir.

Q All convicted felons.

A I'm not sure about Farrell. But the others I'm pretty sure about. But I'm not sure about Farrell at that time. He may be.

Q Now, during cross-examination, you said that you don't have any hard evidence against Timothy Sorrell.

A I don't have any hard evidence, physical evidence, nothing tangible.

Q Yet you decided that you should approach Mr. Kowalski concerning whether an indictment should be sought against Mr. Sorrell.

A Yes.

[180] Q So you had at least a strong enough case to raise that possibility and to make that conversation necessary.

A I discussed it with him, and asked him what he wanted to do.

Q Now, you were willing to – Mr. Godwin didn't testify, Mr. Farrell didn't testify during the sentencing phase of Coleman Gray's trial. You had statements made by two citizens, I don't know whether they had felony records or not, but two people came to you and told you that they had heard Timothy Sorrell talk about killing his wife; that they had seen him at the Greenbriar Mall; said some pretty damaging things about Timothy Sorrell. Later, like I guess Mr. Godwin and Mr. Farrell, came and said that this is all a lie, you didn't press them at all.

A I never recall anyone saying that Mr. Godwin ever said that his statement was a lie. Nor do I recall ever

hearing anyone say that Larabee Farrell said that his statement was a lie. I do recall Ronald Cole saying that he lied. Or that "we lied," referring to Michelle Davis and himself.

Q I think just one final thing. I'm just a little puzzled. During direct examination, you talked an awful lot about Timothy Sorrell and about the way [181] your investigation focused on him and why it did and what you did and about the insurance policy that he took out on his wife's life just maybe two weeks before this happened, and about your inability to eliminate him as a suspect for quite some time, apparently sometime after Coleman Gray started coming into the picture given the certificate of analysis that we saw. We know you talked with Mr. Kowalski about whether you ought to seek an indictment. Yet today you are telling us that you didn't have anything that you consider to be hard evidence against him. I'm wondering, that all sounds like pretty strong evidence. I wouldn't expect you to go to the Commonwealth's Attorney talking about an indictment without strong evidence. What's the difference between strong evidence and hard evidence?

MR. McLEES: The witness didn't say any of that was strong evidence. That's counsel testifying.

THE COURT: No, that's a fair question.

THE WITNESS: There is circumstantial evidence and then there is physical evidence, tangible evidence.

BY MR. LEE:

[182] Q So what you are saying is circumstantial evidence can't rise to the level of strong –

A I'm not saying that at all. I'm saying there was a lot of circumstantial evidence associated with Mr. Sorrell and I went and discussed that with Mr. Kowalski, about indicting him. Mr. Kowalski declined.

Q And Mr. Kowalski never sought an indictment for Coleman Gray, either, did he?

A Well, I discussed that with Mr. Kowalski.

Q But he didn't.

A No, he did not.

MR. LEE: I have no further questions, Your Honor.

THE COURT: All right.

MR. McLEES: May I have a brief recross, Your Honor?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. McLEES:

Q In the statement that Cole and Davis gave you, and the remarks they attributed to Timothy Sorrell about his wife's death, is it correct that they said that he said that she had been shot six times across the forehead?

[183] A That's what he said.

Q Was she in fact shot six times across the forehead?

A No, sir.

Q Where was she shot?

A She was shot in the – I have to think about it. It is not exactly in the back of the head, it is slightly off center, more to the rear than to the front.

Q Now, they asked about whether Mr. Cole and Ms. Davis ever claimed the reward. The reward had to be for information that had led to the arrest and conviction of someone, didn't it?

A Yes.

Q And of course, their information was withdrawn by them within days of giving it to you.

A Yes.

Q When they came in and told you it was a lie.

A Yes, sir.

Q Is it any surprise they didn't claim the reward?

A No, sir.

Q With respect to details for Mr. Godwin's statement having been reported in the newspaper, are you aware of any news reports concerning the [184] McClelland case that reported that a lady detective and a man detective came to visit Gray at the Suffolk Sheriff's holding cell on May 23rd?

A I don't recall one.

Q Was that reported in the news to your knowledge?

A I don't recall reading it.

Q Do you recall reading anything about the male detective being a sergeant with blond hair and a moustache and the woman having long dark hair and driving a red Nova; was that reported in the news?

A I don't recall reading it.

Q Was it reported in the news that the detectives on May 23rd, in talking to Mr. Gray at the Sheriff's Department or sometime before that, had told them he wasn't telling them everything and they had gotten other information from his wife; do you recall reading that in the newspaper?

A No, sir.

Q Do you recall reading in the news a report that Mr. Gray was being kept in the – they didn't want to keep him in the Suffolk jail because they had Melvin Tucker in the Suffolk jail?

A No, I don't recall reading that, either. Not in the newspaper.

[185] Q Do you recall any report in the newspaper about Mr. Gray arguing with the detectives about the conditions he was kept under and not having been given a shower and that sort of thing?

A No, sir.

Q Do you recall any report in the newspapers of June, 1985, about Coleman Wayne Gray's criminal record,

and specifically, that he went to the penitentiary in 1977 on a 21-year sentence and got out on parole in 1983?

A I didn't read anything that detailed, but there may have been a reference to his record.

Q In June of 1985?

A In June? I doubt it.

Q Or before that, with that detailing?

A No, sir. Not detail like that.

Q When you are investigating a homicide and you have suspects, under what conditions do you frequently or routinely go to the Commonwealth's Attorney to discuss suspects or discuss the possibility of getting indictments? Is that an unusual occurrence?

A No. There is nothing unusual about that.

Q Does that indicate that you think that you have a strong case or you are of the opinion you are ready [186] to get an indictment and convict that person?

A Not just because we discuss it, no.

Q Now, Mr. Lee asked you quite a few legal questions about what's hard evidence, what's strong evidence, what's circumstantial evidence. To your knowledge, did you have anything that would have been admissible in Court to prove that Timothy Sorrell was connected to the Sorrell murders?

A Only statements that people made. Only circumstantial evidence.

Q What statement are you referring to, sir?

A I'm saying that the only thing that was there that raised suspicion or that could be used would be statements. There are no – there was no physical evidence involved.

Q What statements are you referring to?

A No statement that he specifically did anything.

Q What statement are you referring to that could have been admitted in Court?

A There are no statements that Mr. Sorrell did the crime. That he murdered anyone. There are no statements as such. What I am saying is that the only thing that could be used in a criminal proceeding would be statements in general.

Q Such as?

[187] A But none associated with him.

Q Well, in 22 years of experience as a police officer, have you ever been allowed to testify in a jury trial in a criminal case to your subjective impression that somebody acted defensive when you questioned them?

A I can't recall any. I don't think so.

Q Would you be allowed to testify that he refused – that he refused to talk to you because he wanted to see his lawyer?

A No. It could not.

Q By the way, in the course of investigating the Sorrell murders, did you develop any information that provided a logical explanation for why Mr. Sorrell was acting defensive with you?

A Yes.

Q What was that, sir?

A Shortly after we found Ms. Sorrell, in going through her effects, we found some checks that were written to her by various people in the area. We went to those people and found that she was selling them cameras, tape-recorders, radios, and other similar items. The origin of those items we were not able to determine. We made inquiries with the Naval Investigative Service to see if they could identify [188] these items as being items that were taken from Mr. Sorrell's place of employment, but they were not able to do so.

Q Where did Mr. Sorrell work?

A The Naval Supply Center.

Q Were these items of a similar nature to items sold in the establishment where he worked?

A Yes, sir.

Q Did the Naval Investigative Service have any information about such items being missing or short on inventory?

A No, sir. Their inventory control was not accurate.

Q They didn't keep a close inventory?

A No, sir.

Q What was your conclusion as to the logical reason why Mr. Sorrell was being defensive with you?

A I believe that he was concerned with criminal prosecution.

Q In connection with?

A The items that we recovered.

Q Mr. Lee has pointed out that there is a lab report that you got from the lab in July of 1985 in the Sorrell case that lists Timothy Sorrell in the name of suspect on the front page. What's the [189] significance of that?

A Only to identify the case.

Q Does that signify that in July of 1985, you regarded Timothy Sorrell as a suspect?

A No, sir.

MR. McLEES: Nothing further, Your Honor.

THE COURT: All right.

MR. LEE: Your Honor?

THE COURT: Go ahead. You can have the last word on this.

REDIRECT EXAMINATION

BY MR. LEE:

Q Detective Slezak, just a couple brief questions. You mentioned that when Lisa Sorrell's body was recovered you found these checks and when you traced them back you learned that she, as I understand your testimony any way, that she had been selling certain items to people in the community that may have been taken from the naval shipyard?

A No, from the Naval Supply Center.

Q From the Naval Supply Center.

A Yes.

Q Where did Timothy Sorrell work during all this time?

A The Naval Supply Center.

[190] Q Was he involved, do you know whether he was involved in some sort of theft ring; did you investigate that?

A We made some inquiries with the Naval Investigative Service, and there was no determination made.

Q Were they investigating whether he was part of a theft ring?

A They were trying to determine whether or not the items that we had recovered were government property. And they were unable to do that. Now, what they did beyond that, I have no idea.

Q So you discovered a possibility that Timothy Sorrell and his wife were involved together in some sort of theft ring or theft operation concerning the Naval Supply Center?

A Yes. We investigated that.

Q Did you investigate whether their involvement in that activity may have had something to do with her death?

A We looked into that. We looked into the whole situation as best we could, yes.

Q And what did you learn?

A Nothing.

Q Did you consider whether their joint involvement [191] in that theft ring may have been one more motive for Timothy Sorrell?

A We considered it.

Q And you abandoned that idea?

A Eventually.

Q Any reason?

A Once I became familiar with the case with Mr. Gray, yes.

MR. LEE: I don't have any further questions.

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In the United States District Court for the
Eastern District of Virginia

[Caption Omitted in Printing]

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[274] Q You mentioned the Certificates of Analysis. I believe they are Exhibit 3 in the exhibit book. If the witness could be handed that.

(Documents proffered to witness.)

Mr. Brown, are you generally familiar with exhibits 3-A through G, Petitioner's Exhibits 3-A through G?

A Yes, I've reviewed them.

Q Have you reviewed them as part of your investigation?

A Yes, I have.

Q Just generally, do you find anything in those certificates that you consider to be significant with respect to your investigation?

A There was one –

MR. McLEES: Objection. It calls for a conclusion on the part of the witness and it is vague and it may very well be irrelevant.

MR. TURNER: I just wanted to ask Mr. Brown, since he used, reviewed these documents in his investigation, if there was anything in them that he found significant in his effort to determine what happened with respect to the Sorrell matter.

MR. McLEES: I think if there is anything counsel considers significant, he can ask him a [275] specific question.

THE COURT: Why don't you do that. You are talking about something substantive in the certificate?

MR. TURNER: Right.

THE COURT: Do that. Just point to it.

MR. TURNER: Your Honor, in fact, I understood clearly the parameters that you first mentioned yesterday, and totally am comfortable with those. The reason I'm going beyond those today was because my understanding was that was the way it was going to be done today, that Mr. McLees would be putting on evidence and that's why I am, frankly.

THE COURT: To a certain point. For instance, these certificates, the prosecutor has indicated he didn't know anything about them. So how much impact that's going to have on my decision, I don't know. But I'll let you go. But don't get too ridiculous.

BY MR. TURNER:

Q Mr. Brown, after reviewing those certificates as part of your investigation, did you see anything in them that you found to be significant for your work? A Two things. One thing, the suspect or a suspect was named on the certificates in the name of Timothy [267] Sorrell. Another point that I observed was there was a hair fragment that was found in the vehicle, also Timothy Sorrell's. In an interview that I had conducted with Mr. Herbert and Brenda Nixon, they had advised me that Lisa Sorrell, the deceased –

MR. McLEES: Objection, hearsay.

THE COURT: Sustained.

MR. TURNER: At a later date, I will connect up the Nixon interview. I have a reason why I believe that is not hearsay. But we can pass that by for the moment. I can argue that in just a little bit.

THE COURT: All right.

THE WITNESS: The Nixons had advised me –

BY MR. TURNER:

Q You can't go on at this point on that. Is there any other item that you recall in those documents that you found?

A The other item was a hair fragment that was found. I had information that Mr. Sorrell did not –

MR. McLEES: Objection, Your Honor. He is not even stating the source of his information now. Hearsay.

[277] THE COURT: Sustained. Move on.

BY MR. TURNER:

Q Did there come a time when you interviewed Herbert and Brenda Nixon?

A Yes, there was. I conducted several interviews with the Nixons.

Q Did you ask the Nixons questions about the Sorrell matter?

A. Yes, I did.

Q Did the Nixons relate to you any information that either they provided the Chesapeake Police Department, and specifically, Detective Michael Slezak, or information that Detective Michael Slezak provided to them concerning the Sorrell murders?

A Yes. Both.

MR. TURNER: Your Honor, I'd like to proceed with questions in this area. The evidence is not being offered –

THE COURT: Go ahead.

MR. McLEES: I would object. From this witness it is hearsay and not within his personal knowledge.

THE COURT: I'll let him testify to what the Nixons indicated to him that they had informed Slezak and what he told them.

[278] BY MR. TURNER:

Q Mr. Brown, first, what did the Nixons indicate they had informed Detective Slezak concerning the Sorrell murders?

A They had indicated that they had provided him with the events that took place on December 5th; that Lisa has came to their residence around 4 p.m. to pick up Shanta. Also, that Lisa had – was engaged in a conversation with her husband, Timothy, concerning a change of plans which resulted in Lisa going to the Greenbriar Mall to take Shanta to have photograph taken with Santa Claus. It had originally been scheduled for the following Saturday. In addition to that, there was information that Lisa had attended or stopped at Wendy's Restaurant and

consumed a baked potato, and that she had went to a bank to purchase money orders.

They also indicated that around 7:00 to 7:30, they had received a phone call from Timothy Sorrell requesting the whereabouts of Lisa. At that point, she didn't know where Lisa was and became worried. From there, she began to call Lisa's residence in 5-minute intervals to see if she could make contact. Around 10:00 to 10:30, again, there wasn't any contact at the residence. Timothy called again [279] indicating again what had happened or had she heard from Lisa. Shortly after his phone call, he showed up at the Nixon's residence. When he came in the door, Mrs. Nixon stated that he was crying. And there were conversations of what had happened with Lisa. Neither of them knew at that point, but Mrs. Nixon indicated to me that her mother's instincts indicated to her that something was wrong and possibly Timothy was involved.

MR. McLEES: Your Honor, at this point I object. Not only is it hearsay, not within his personal knowledge, but it is not within the facts known to the declarant. Mother's instinct?

THE COURT: This is simply informing me of what they told Slezak and I want to know that. Go ahead.

THE WITNESS: Other information they had told Detective Slezak was later that evening, there were a meeting at the Sorrell's residence of the families concerning what to do. And in her – she was confused about what was going on with her daughter so she wanted to do something. She went into a hamper to wash clothes,

and she pulled out a pair of jeans, and she had remembered that these jeans were the same jeans that Timothy had on prior [280] to him coming to the house. The point about the jeans, she indicated to me that the jeans were soaked from the knees down. They were wet. They were soaking wet.

She went on to tell me about Slezak. They were very close, to the point that Detective Slezak may have even encountered some kind of flack or grief from his department because they exchanged information on a daily basis.

Other points, she indicated that there were bullet fragments found in the rear of the automobile.

Q Did Mrs. Nixon indicate that she had learned anything from Detective Slezak concerning the crime; that he had provided her with any information that he had concerning the Sorrell murders?

A He had provided them with information concerning there was some form of paint maybe used, that a money order had been purchased. He advised them of the stop at Wendy's because of, I guess, Certificate of Analysis. Give me a moment to remember.

Q Was anything said concerning the United States Navy, any installation?

A Yes, there were a lot of conversations concerning Timothy's employment. It seems their son, [281] Cary Nixon, had assisted Timothy in getting employment with the Naval Exchange. In less than six months, Timothy had become a supervisor of the Naval Exchange. During that time period, a major theft ring existed at the exchange. It

seemed like Timothy was a participant or associated with the participants in this ring.

Lisa had become disturbed because there was a visit a week prior to her death from a gentleman either possessing stolen merchandise or in conversation with Timothy concerning stolen merchandise. Lisa had brought this to the attention of her mother, and shortly after the death of Lisa, the Nixons provided this information to Detective Slezak. From what they had indicated to me, Detective Slezak, Chesapeake Police Department, had confiscated this merchandise from an uncle of Timothy Sorrell's.

Q Was there any information that Ms. – strike that. Did Mrs. Nixon ever indicate to you that either she to Detective Slezak, she or her husband, or Detective Slezak to her ever suggested who might be responsible for the Sorrell murders?

A Yes. They felt Timothy Sorrell was responsible for the murder, very strongly, from his actions [282] coming in the door the night of the fifth crying, throughout various points of nervousness and not carrying on his normal activities. It seems from that point, he and his brother began to associate very closely, always going places together.

Q Did Mr. and Mrs. Nixon ever mention to you that they had discussed with Detective Slezak anything to do with drugs?

A I can't recall anything to do with drugs from a conversation with the Nixons.

Q Is there anything else with respect to the evening of December 5th, 1985 – excuse me, 1984, that you can

recall as to Timothy's activities that evening, the Nixons said that they discussed with Detective Slezak?

A Another point that was raised, Timothy had basically, or he was under the pretense that he was at school on that evening. Detective Slezak had verified that he was not at school on that evening, but that he was at a female friend's home when he made the phone call, the 7 o'clock, 7:30 phone call.

Q Did you talk with Detective Slezak about this case?

A Yes. We had a brief interview with Detective Slezak at the Chesapeake Police Department.

[283] Q Did he acknowledge that he had had extensive he contacts with the Nixons?

A Yes, he did.

Q And that information was passed freely back and forth between him and the Nixons?

A I can't actually say he told me that. He was reluctant in discussing some information with me. But he did imply that the Nixons and he were on a first-name, friendly basis dealing with this case.

Q Was there any indication that the Nixons had had contact with Detective Slezak throughout the whole investigation of the Sorrell murder?

A That was my impression.

Q Have you talked with anybody else who had contact, that you know at least, with Detective Slezak or any other law enforcement authorities?

A Yes, the son, Cary Nixon, had quite a bit of contact with Detective Slezak as well. It seems like there may have been one point when Detective was requesting Slezak additional names or information the Nixon's son.

Q Do you have any knowledge of information that Cary Nixon either passed to Detective received from Detective Slezak or Slezak?

A No, I don't have any. It wasn't – he didn't [284] elaborate on what information he had passed to the detective

Q Is there any other witness you have interviewed that you know of that had contact with law enforcement authorities with respect to the Sorrell matter?

A That had contact with the law enforcement?

Q Right, any law enforcement authorities, either in Chesapeake, Suffolk, or wherever.

A The brother, Timothy Nixon. Excuse me, Timothy Sorrell.

Q Who was that?

A His name is Cary Sorrell.

Q In general, what contact did he have with law enforcement authorities that he shared with you concerning the Sorrell matter?

A He basically shared a harassment relationship with the police department and him.

Q Had he been charged with any crimes, to your knowledge?

A Yes. He was charged with possession of a small amount of cocaine. It seems that there was a female by the name of Cynthia Talatano. It is believed that she is an informant for the Chesapeake Police Department. She came into the picture by a visit to [285] the Nixons shortly after the murder. It seemed to be a bogus visit. The Nixons didn't relate any point to the visit, other than that she came looking for Timothy Sorrell. And she left. There was some relationship or Cynthia became involved with Cary, a very short relationship where they traveled someplace and they were arrested by the police.

Q In the course of your investigation, Mr. Brown, I assume you were informed, I believe, of who Coleman Wayne Gray is?

A Yes.

Q You understood, I believe, that I was representing Mr. Gray?

Q During the course of your investigation which I understand has been over a year-and-a-half to 23 years, have you come across any information at all which in your professional judgment would connect Mr. Gray to the Sorrell Murders?

A I have not

MR. TURNER: Thank you, Mr. Brown.

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[Caption Omitted In Printing]

[293] THE COURT: Obviously. All right, you can call your first witness.

MR. McLEES: Brenda Nixon.

BRENDA NIXON,

called as a witness by and on behalf of the Respondent, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLEES:

Q Good morning, ma'am. Would you state your name for the record, please?

A Brenda J. Nixon.

Q In December of 1984, did you suffer the death of [294] your daughter and your granddaughter?

A Yes, I did.

Q There names were what?

A Lisa Renae Nixon Sorrell, Shanta Sorrell.

Q Shanta was how old, ma'am?

A Three.

Q I'm going to ask the Marshal to show you a photograph that has been marked and received. The photograph has been marked Respondent's Exhibit E. Copies

of it have been admitted in evidence as Respondent's Exhibit E. I don't know if Your Honor would like to see the original.

THE COURT: No

(Document proffered to witness.)

BY MR. McLEES:

Q Is that your property, ma'am?

A Yes.

Q Who is depicted in that photograph?

A Lisa and Shanta.

Q Roughly when was that taken, do you know?

A I'm not sure of the date.

Q Within a year or so –

A She got that coat for Christmas. I do know that.

Q Do you remember what day you last saw them them [295] alive, ma'am?

A On Wednesday, the fifth of December, 1984.

Q And where was it that you last saw them alive?

A At my home in Chesapeake.

Q How far is your home from Greenbriar Mall?

A Approximately two miles.

Q How did they come to be visiting at your home on December 5th, 1984?

A Shanta was in pre-school, and I had taken her. Lisa came to pick her up in the afternoon from my house. She left the job something like 3:00 or 3:30 and come directly there to pick the baby up.

Q What time did they leave?

A Between –

Q Excuse me, what time did Lisa come to pick Shanta up?

A She was there no later than 4:30.

Q What time did they leave?

A Between 4:30 and quarter to 5.

Q Did you ever hear from them again?

A No.

Q Did you ever see them alive again?

A No.

Q Now, I am going to ask the Marshal to show you a newspaper clipping, a copy of which has been entered [296] as Respondent's Exhibit F-1. Have you ever seen that clipping before, ma'am?

A Yes.

Q Did you cut that out of the paper?

A Yes.

Q And what do you remember and what – paper that was published in?

A The Virginia Pilot.

Q Approximately when?

A The funeral was the 15th. Probably a week after the funeral.

Q That depicts what, ma'am?

A Excuse me?

Q What does that show?

A A picture of Shanta and Lisa and it is the obituary from the funeral.

Q I will ask the Marshal to show you another clipping, a copy of which has been admitted as Respondent's Exhibit F-2. What is that, ma'am?

A This is the picture that was taken when they found them.

Q When was that published, roughly?

A December, let's see, it was five days before they found them, so it had to be around the 10th, something like that.

[297] Q Of 1984?

A 1984.

Q Those are pictures of whom in that clipping?

A It is a picture ever Shanta and Lisa.

Q I am going to ask the Marshal to show you a clipping, a copy of which has been admitted as Respondent's Exhibit P-1. Where was that published, ma'am?

A This was taken from the Virginia Pilot, also.

Q And there is no date on that clipping, is there?

A No.

Q Directing your attention to the second paragraph in that clipping, does the article state when the bodies were found?

A Yes.

Q It says the bodies of Lisa Sorrell and her daughter, Shanta, were found Monday?

A Uh-huh.

Q So it was published within a week or so after the bodies were found?

A Right, yes.

Q And directing your attention to the first sentence of that clipping, could you read that, please?

[298] A The one that says, "A church"?

Q Yes, ma'am.

A "A church and a radio station have collected about $5,000 for a reward fund for information leading to the arrest in the slaying of a Portsmouth woman and her three-year-old daughter."

Q And directing your attention to the last full paragraph on that clipping, could you read the first sentence of that?

A "Organizers hope to have $10,000 by Monday."

Q Thank you. That's enough. I am going to ask the Marshal to show you a clipping, a copy of which has been

admitted as Respondent's Exhibit P-2. That was published where, ma'am?

A Virginia Pilot.

Q What's the date on that?

A January 7th, 1986.

Q 1986. So it is the month after Mr. Gray's trial?

A Yes.

Q And would you read the first sentence of that article, please?

A With "Commonwealth's Attorney"?

Q Yes, ma'am.

A "Robert E. Kowalski, Jr. has signed an affidavit [299] affirming that Timothy Sorrell is no longer a suspect in the year old slaying of his wife and daughter, apparently clearing the way for Sorrell to claim about $60,000 in disputed life insurance money."

Q Thank you. I am going to ask the Marshal to show you a clipping, a copy of which has been admitted at Respondent's Exhibit P-3. And I will ask if you can identify that, please.

A Yes.

Q When was that published, ma'am?

A This was published Monday, April 8th, 1985.

Q In what newspaper?

A Virginia Pilot.

Q Directing your attention to the second page of that article, ma'am, in the first column, the left-most column, at the bottom of that column, could you begin reading that paragraph where it begins the investigators, please?

A "The investigators say the case had been hampered by little assistance from the community, despite an $11,000 reward offered by police, area radio station, Chesapeake church. 'The main problem here is that we have information coming in from the victims' parents and her side of the family. That's the extent of it,' Slezak said."

[300] Q Go on. The next sentence?

A "Timothy Sorrell, Lisa Sorrell's widower, declined to comment at the instructions of his lawyer."

Q Thank you. And of course all these articles are referring to the investigation of your daughter's and granddaughter's death?

A Yes.

Q I ask the Marshal to show you a clipping, a copy of which has been admitted as Respondent's Exhibit P-4 and ask you if you can identify that.

A Yes.

Q In what newspaper was that published?

A Virginia Pilot.

Q And there is no date on that, is there?

A No.

Q Would you read the first sentence, please?

A "Clothing from a Chesapeake woman and her three-year-old daughter were taken for analysis to the FBI Crime Lab in Washington, D.C. on Tuesday, eight days after the bodies were found in a rural section of Deep Creek."

Q So this was published approximately when, ma'am?

A It says eight days after the bodies were found, [301] so about the third week.

Q Within two weeks after the bodies were found?

A Yes. Looks like it.

Q Let me ask you to read another couple of sentences from that article. Going down to the fifth paragraph in the article, the one that begins with two people.

A Yes.

Q Could you read that sentence?

A " 'Two people, including Lisa Sorrell's husband, Timothy, have been questioned by police and given lie detector tests,' Ziegler said."

Q The next sentence?

A "He said Timothy Sorrell was brought in for questioning last Thursday."

Q Thank you, ma'am. And that also is referring to the investigation of your daughter and granddaughter's death?

A Yes.

Q Thank you. Now, there has been mention in evidence of a life insurance policy on your daughter, Lisa Sorrell. To your knowledge, was there such a policy?

A Yes.

Q Could you tell Judge Spencer, please, how that [302] policy – who instigated that policy, how that policy came to be purchased?

A I originally called Prudential Insurance to get it set up. They had lost the policy and I found out that there was no insurance being carried on them. So I called and told them that we would help them with the payment of the money. And then the man, he originally met Lisa at my house, then they worked from there, went to Portsmouth, and talked with her husband.

Q And was that the only life insurance policy that you and your husband purchased for that?

A Yes.

Q Who did that cover?

A Lisa and Timothy.

Q It covered both of their lives?

A I think it was a family-type thing, yes.

Q Who was the beneficiary if Timothy were to die?

A If Shanta was living, probably went to the daughter. But I was not on there as a beneficiary.

Q Were both Timothy and Lisa employed?

A Yes.

Q And was that necessary in order to provide a home for your granddaughter and to support your granddaughter?

[303] A Yes, it was.

Q Now, ma'am, there has been some evidence introduced about statements that were attributed to you about what happened the evening that Lisa and Shanta disappeared and evidently were murdered. You have told the Court that you last saw them alive at approximately 4:45. When did you begin to miss Lisa? When did you begin to become concerned?

A It was an hour later.

Q And why did you become concerned then?

A She was supposed to go straight home. She was going home and she was going to call me when she got in.

Q When she left your house, where was it that she was going according to your understanding?

A To have the baby's picture taken with Santa Claus.

Q Where?

A Greenbriar Mall.

Q And you expected her to be at her home when?

A No later than 5:30 or quarter to 6, something like that.

Q And so you called her home and was there a response?

A No answer. No one.

[304] Q What did you do then?

A I kept dialing about every ten minutes, every five minutes.

Q Obviously there was no response?

A Up until 8 o'clock that evening or something.

Q And each time you called her home and there was no response, what effect did that have on your state of mind?

A Well, I knew something was wrong, because that wasn't like Lisa.

Q Do you remember approximately when the first time you heard from Timothy was after you had last seen Lisa?

A He called around twice. First one could have been around 6:30 in the afternoon, earlier, maybe just a few minutes earlier.

Q What did he say or what was the purpose of his call then?

A He asked me had I heard from Lisa.

Q And what did you say? Do you recall roughly what you said?

A I repeated that she had as far as I knew, she had gone to have the baby's picture made but should have been home by then.

Q And were you worried at that point about her?

[305] A Yes.

Q Would that have come through in your voice or in remarks that you made to Timothy?

A Yes.

MR. TURNER: I object to that. I don't think a witness can say whether something would come through to another person.

MR. McLEES: Well, Your Honor –

THE COURT: Overruled. Go ahead.

BY MR. McLEES:

Q When did you next hear from Timothy, approximately, if you remember?

A About 7:30 I got a second call.

Q And what did he ask at that time?

A Had I heard from Lisa still.

Q And what did you tell him?

A No.

Q And did he call subsequent times during the evening?

A The next call, I think, was after ten that night, around 10:30 or so. 10:15 to 10:30.

Q That was from Timothy again?

A Yes.

Q Did he ask for Lisa again?

A He asked was she over there at my house , and I [306] said, "No, she is not and I haven't heard from her."

Q Did you see Timothy that evening?

A Yes, I did.

Q What time did you see him?

A He got there about 15 minutes later. He was at my house about 10:30.

Q And what was his condition at that point?

A He came up on my steps and he was crying. And his he came into the living room and we went to the phone in the kitchen. I started talking about what had happened , "Where is Lisa?" And I asked him, I noticed his pants was wet but it was raining that day. It was drizzling like.

Q And did he stay at your house or did he leave?

A No. He left to go by then he decided we were going to check the area around the Greenbriar Mall to see if he saw the car. And so he left and went to Greenbriar to drive around and see if he could see the car.

Q When he did that did your husband stay with you or did he leave?

A My husband was almost out at the same time.

Q To do what?

A To go to the Greenbriar to see if he could see, too. They drove separate cars. My husband went in [307] his own car.

Q Did they return to your home?

A My husband came back.

Q Okay. Did Timothy –

A Timothy had come back, yes, because we all had left to go to his house.

Q What time roughly did they come back to your house?

A About ten minutes later. Greenbriar is two miles. It is very close.

Q That would have been what time?

A About quarter to eleven.

Q On the evening of December 5th?

A Right.

Q And then you went together to his house?

A We got in different cars and drove over to Portsmouth where they lived.

Q To Timothy and Lisa's house?

A Yes.

Q How long did you stay there?

A I was there in and out I was there all day. I didn't go back to my house for five days.

Q From 11 o'clock or so in the evening on December 5th until late the next day you were there?

A Yes, I was there a couple days.

[308] Q How long did Timothy stay there when you arrived there at approximately 11?

A How long he stayed at the house?

Q Yes, ma'am.

A Well, he stayed there. I don't remember him leaving to go anywhere else.

Q So at 12:40 in the morning of December 6th, where would he have been?

A He was in his house at 911 Taft Street in the den.

Q With whom?

A My husband and a couple other people and myself.

MR. McLEES: Your Honor, I have no further questions of this witness.

THE COURT: All right. Mr. Turner?

CROSS-EXAMINATION

BY MR. TURNER:

Q Good morning, Ms. Nixon. My name is Paul Turner. I represent Mr. Coleman Gray in this matter. I know this is an extremely painful subject for you and if at any point you want a break or anything, I'm going to try to move right along, but please ask Judge Spencer and I'm sure he will accommodate you.

[309] I take it Timothy Sorrell was well aware of the life insurance policy you mentioned earlier?

A He would have to be because he had to sign.

Q He had to sign to acquire the policy?

A Right.

Q So he was clearly aware that he was a beneficiary of that insurance policy?

A He was clearly aware – I think so.

Q When Timothy called – let me make sure I understand. He called, you thought, around 6:30 on December 5th?

A Yes.

Q Did he say where he was calling from?

A No. He did not.

Q Did you ask him?

A No, I did not.

Q I think you said he called again, I believe you said around 7:30.

A About 7:30.

Q Did he say at that point where he was calling from?

A No, he didn't.

Q Did you ask him?

A No, I did not.

Q Do you have any idea at this point where he was [310] calling from?

A I think I thought he was at a public telephone booth at the campus, at school.

Q Did you have any reason to think he was at a school?

A He went to school nights. He had night school. He was in night school, college.

Q This was Wednesday night, I believe, December 5th?

A Yes.

Q Would that have been a night that you would had expected him to be at school?

A Yes.

Q But you didn't ask him and he didn't say?

A No, I did not ask him.

Q Then I believe you said that he called again around –

A After the school sort of let out. After ten. It was after ten then.

Q So that's at least two-and-a-half hours since the previous call?

A Right.

Q Did that surprise you that such a time frame gone by before you heard from him again?

A Well, not really. I was thinking he was in [311] school. If you are in class, you can't get up and make calls unless you get a break or something.

Q If we assume hypothetically, just assume, that he was not at school, let's just assume that, I'm not asking you to say that, I'm just assuming that, that he was not at school and he had a telephone very accessible. Would you have been surprised that he would not have called for two-and-a-half hours in light of the events that you have outlined previously that were moving along?

A You say would I be surprised that he didn't contact us before?

Q Yes, ma'am.

A I'm not sure how to answer that. No, I wouldn't be surprised, because I thought he may have been yes, I would. Because if he called his house and he didn't get no answer, then my house would have been the next he called. But I was surprised that there was no connection between Lisa and the phone. She wasn't there.

Q Did anyone ever tell you subsequent to December 5th, 1984, that Timothy Sorrell was not at school that night? Did anyone ever tell that you?

A During the investigation, I found out.

Q Who told you?

[312] A The officer came to the house and questioned him. And I was there at the time. And we found out that day, I think, that he was not at night school.

Q Did you know where he was?

A They did say. They gave a girl's name, a lady's name, and the address. They asked him where was he. I don't remember her name. But evidently he gave as an alibi. I don't know what time he left there, though.

Q In light of that information that you obtained, was this a few days after the discovery of what had happened?

A This was approximately about one to two days while she was still missing.

Q That you received that information?

A Uh-huh. Yes.

Q Did that affect your reaction to – strike that. Did that in any way influence your feelings about what had happened on the evening of December 5th? That information?

A No, it didn't.

Q You mentioned that you found some wet jeans, I believe.

A He had them on when he got to my house that [313] night. I noticed they were wet that night when he came into the house. Then we left to go back to his house, and by the time his sister did some picking up and things and when the police came, they took the jeans and they were still wet then.

Q Did you tell the police about the jeans?

A No.

Q How did they get the jeans?

A I guess during like an – a search or something, they just went around and looked. I think they asked what did he have on that night and that sort of thing.

Q Did you ever discuss the jeans with the police?

A Yes, I was asked what he had on when he got to my house. And I said, "Jeans and a jacket and a shirt and a hat."

Q Did the police ever express to you at any time any significance that they attached to the jeans?

A No.

Q Did you ever say to them any significance that you might have attached to the jeans?

A No. Well, I could have said the jeans, I noticed the jeans was wet.

Q Did you feel that that was of some potential significance?

[314] A Two years later. Can I say why?

Q Certainly, sure.

A When they found the car, I went out there, and I noticed from the pictures the grass was up high around the car. And I was grasping for straws, trying to figure the thing out. So if you walked in grass, your pants or legs would have gotten wet. But he could have gotten rain on them, also.

Q Mrs. Nixon, I believe that at some point in time the in the fall of 1985, the Prudential Insurance Company filed a legal proceeding in Norfolk Federal Court. Are you generally aware of that?

A Yes.

Q There is a fancy legal term for it that even most of us lawyers don't even know what it means. It is called

interpleader, when you put money in Court when there is more than one party that says they deserve to get the money. Does that sound like what was filed and are you familiar with that?

A Yes.

MR. TURNER: If the witness could be shown the exhibit book, please.

(Exhibit book proffered to witness.)

BY MR. TURNER:

Q Before we get into the book, I take it there was [315] a point in time when you engaged the Sacks firm.

A Yes, I did.

Q And I believe your lawyer was Mr. I know Andrew Sacks is the son. Do you remember the name of the gentleman?

A It was a lady.

Q Would that be Sue Ellen Keefer?

A Yes.

Q Did you engage her directly to represent you with respect to the Prudential matter?

A Yes. I was trying to get the insurance company to hold the money.

Q Have you contacted the Prudential Company to indicate you felt you should get the money?

A No, I did not.

Q Do you know of anyone who had on your behalf contacted the insurance company?

A During the process of the five days, I think, that I was at the house, the insurance came up because it was due to be paid on. And I think he made a payment while I was there. I'm not sure how else the insurance came into the picture.

Q Do you know who would have been – who was the beneficiary of the policy under the very unfortunate circumstances that had occurred; do you know who [316] would have received or who was at least the apparent beneficiary of that policy?

A Timothy.

Q Timothy Sorrell?

A Yes.

Q Did there come a time when you even formed a personal opinion that Timothy Sorrell should not receive those proceeds from that insurance policy?

A Yes.

Q When was that, ma'am?

A Probably within a month after the death, while – think Prudential called us, and they had to – we met them at my house. They sent someone in from Florida, I think, and I forgot the gentleman's name. And I was asking questions. "Could the money wait until we found out what happened to them?"

Q Why did you feel that Timothy Sorrell should not immediately get the proceeds?

A Because of the way the investigation was going and he was a suspect to us.

Q Okay. When you say "to us," does that mean –

A My husband, myself, and the Chesapeake Police Department.

Q So all of you, your husband, yourself, and Chesapeake Police Department, you are saying, looked [317] upon Timothy Sorrell at that time as a suspect?

A I think the detective could say that I never looked at him as a suspect.

Q You personally never did?

A No, I never have looked at him as a suspect.

Q Were you in contact with the detective, Mr. Slezak?

A Yes, he worked on the case.

Q Did he look on him as a suspect?

A Well, yes, they did.

Q Did your husband look on him – your husband is Herbert Nixon?

A Yes.

Q Did he look on him as a suspect?

A Well, our opinion, I think, was that maybe he knew what happened. But I never thought that he actually did it.

Q When you say didn't actually pull the trigger –

A Pull the trigger, right. But I figured he knew what happened.

Q You thought Timothy Sorrell knew what happened?

A Yes.

Q Do you still think that today?

A Oh, yes, I do.

[318] Q You do?

A Yes, I do.

Q As I understand it, Sue Ellen Keefer was an attorney with the Sacks firm in Norfolk?

A That's right.

Q Andrew Sacks, and I'm drawing a blank. There is a senior Mr. Sacks whose name I can't think of. Do you know that gentleman?

A Yes.

Q That was the firm that was representing you, no question about that?

A Right.

Q Did anyone at some point suggest that you should file a pleading in the case we mentioned earlier saying that you – that Timothy should not receive the proceeds of the policy?

A The insurance company explained to us the procedure that they had to go through. They did want to give the money just to the beneficiary. And then they

asked and what would the next step be that we could do. That's when I hired them, the lawyer.

Q Ms. Keefer?

A Yes.

Q What did Ms. Keefer do at that point?

A She basically represented us. I did not go to [319] court myself. So I think she appeared before the judge and told him what we wanted, were trying to do about the beneficiary money.

Q Did you have a meeting with Ms. Keefer?

A Yes, we met a couple times.

Q Did Ms. Keefer ask you if you knew about the Sorrell murders, the unfortunate time?

A We discussed what was happening as far as up to that point. We didn't get into any specifics or anything, just that basically her interest was the insurance money.

Q Did you share with her the information you had up to that point, with your lawyer?

A We shared with her about the money and the insurance, that she knew how the policy originated and that type of thing. And she also, I think, knew that Timothy Sorrell was being looked at as a suspect.

Q Did you share with her that you had been in touch with Detective Slezak?

A I don't remember telling her. I couldn't say.

Q By the way, did you have contact with any other police officers from Chesapeake or any other jurisdiction in your area with respect to this matter?

[320] A I think there was a Detective Peters that with them, had worked on it. He was the first one. I had met Detective Slezak then. We met a Detective Pierce that came over and took like I guess you would say a report. And I have forgotten, Detective Slezak had a partner. We called him Buddy, but I forgot last name.

Q Could it be Harrison?

A Yes, I think it is. And I think that was the three. Captain Ziegler, at the time, we met with him a couple, few times. So I think that was all of them.

Q Did you review a legal document that was filed on your behalf in the case? I would direct your attention to the Tab 1 and a Tab 2. Focusing on Tab 1, Mrs. Nixon, if you would go back about to the sixth page. Pass by the first five pages, which I won't get into at this point. Go to the sixth page. You will see a document that's titled "Answer." should be under Exhibit 1. It should be the sixth page back from the beginning. Maybe it is the fifth page. But there are two documents that are Exhibit 1. A document called a Complaint, and then right behind it is a document called an Answer. Do you that there?

[321] A I've got it.

Q Take a look at that document. Do you have any recollection of seeing the document? On the third page, you will see that it purports to be signed by someone on behalf of the Sacks firm, and I believe that's Stanley

Sacks. That's the gentleman I couldn't think of. Have you seen that document, ma'am?

A You say signed by him?

Q Yes. It looks like. It appears to be Mr. Sacks' signature on the third page.

A I'm not sure. Yes, it would have to be because that's who we met with the first time.

Q Mr. Stanley Sacks?

A Yes, we did.

Q I'll represent to you as an Officer of the Court, this purports to be an answer filed on your behalf, on behalf of Herbert L. Nixon and Brenda J. Nixon. Are you Brenda J. Nixon?

A Yes.

Q Have you ever seen this document before?

A Yes.

Q If you would look at paragraph five first, ma'am, it is the second page. paragraph five. And if I could just read it to you and just ask you a [322] question or two about it. It says: "Timothy Sorrell is not entitled to receive the proceeds of the insurance policy because on information and belief, he caused the death of Lisa Sorrell and is currently under investigation by the Chesapeake Police Department."

Do you recall that statement being made in this document?

A To be honest, I don't think I read this whole thing all the way through. But those were some of the things that we said.

Q Do you have any reason to believe that that statement was untrue when it was made?

A No.

Q In paragraph six, ma'am, right below five, if I could just read it to you. It says: "It is anticipated that an indictment will be issued for Timothy Sorrell for the murder of Lisa Sorrell in the very near future, and that Timothy Sorrell will be convicted of the murder of Lisa Sorrell." Do you see that, ma'am?

A Yes, I do.

Q Do you have any reason to believe that that statement was not true when made?

A I still wouldn't believe that until I had some [323] more evidence of what was going on.

Q So you personally had some doubt about that?

A Yes, I always had doubt.

Q On the third page of the document, ma'am, just for the record, I believe you will see that there is a certificate of service that is dated the 27th day of November, 1985. Do you see that, ma'am?

A Yes, I do.

Q Do you have any reason to believe that this document was not filed on or about that day, 27 November, 1985?

A No.

Q Did your attorneys, were your attorneys authorized to file this document on your behalf?

A Yes.

Q I would represent to you, and I won't waste anybody's time, but there is a companion document. There were two – it is a technical thing. There were two cases filed. There is a companion document essentially identical to this one. I won't waste your time going through that. Do you remember that for some reason two cases were filed? I don't know whether you got into that kind of detail or not.

A I got a set of papers and my husband got a set?

Q There was a case filed with reference to monies [324] that would have been available on the life of Lisa and there was a separate case filed with respect to Shanta.

A Yes, there was.

Q You remember that.

A Yes.

Q Yes, ma'am.

Do you recall when Detective Slezak first entered the picture, so to speak? How much after the unfortunate events occurred was that?

A Within that week we met with him.

Q Did you have very close contact with Detective Slezak from that point forward?

A Yes, I did.

Q Just approximately, how often would he call you?

A I think I would call him more. I'm sure I was on the phone a couple – every other day or so trying to see if they had heard anything.

Q Did that go on for a long period of time?

A I would say one year, I think.

Q You think you had close contact with Detective Slezak for at least one year?

A Yes.

Q And that would be one year from –

[325] A From December – after the 15th of December.

Q After the 15th of December, 1984?

A Yes.

Q You had close contact with Detective Slezak at least until a year from that date?

A Right.

Q By close contact, we are talking about these more than one phone call per week, either you to the detective or I assume him returning your call?

A Right, he would return the call.

Q Do you feel that he kept you fully informed of the investigation from his perspective?

A No.

Q You don't?

A No. I figured it was something the police did that they couldn't tell me.

Q Did he keep you substantially informed?

A Yes, he did.

Q Did you keep him informed at least of anything that you felt, knew, whatever about the case?

A Yes.

Q Do you feel you shared very openly with him any of your feelings about the case?

A I think so. Yes, I would say so.

Q How about your husband; was he involved by your [326] side all the way on this or did he do anything independently?

A No, he did not.

Q Would it be normal that he would have been with you whenever the matter was discussed at any meeting or anything?

A Yes, he would have, most of the time, I think. If there was a meeting, we would have been together mostly.

Q When you were on the phone, unless you had a conference phone, I assume it was either you on the phone –

A Just me most of the time. I did most of the calling.

Q Did Detective Slezak come to your house on occasion?

A During the investigation, the first week, I think, we left Lisa's house to meet them at our house in Chesapeake. No, he was not there. I don't think it was that often he was at my house. He came to look at something pertaining to pictures, that type of thing. But I don't know how often it was. That wasn't regular.

Q What is your relationship, if any, with Timothy Sorrell at this time, ma'am?

[327] A There is no relationship.

Q No relationship?

A No. I tried, but – but I didn't get it from the other side.

MR. TURNER: That's all I have. Thank you very much.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. McLEES:

Q With respect to Mr. Sorrell, Timothy Sorrell's jeans being wet that evening, what was the weather that evening?

A Misty rain.

Q It was raining?

A Yes.

Q Mr. Turner directed your attention to paragraph five of your answer in that lawsuit where it says, "Upon

information and belief, Timothy Sorrell is responsible for the decedent's death." Do you remember that paragraph?

A Yes, I do.

Q That was essentially meaning that you had received information and as a result of that, you believed that he was responsible for the young lady's death; is that correct?

[328] A I think in the process of this, I found out, when I say responsible, I still say I didn't never believe he actually was the one that pulled the trigger, because I didn't see no marriage problems and they got along, that sort of thing, as far as I saw. But I always had suspicion of he knew why it happened.

Q So you thought he knew why it happened?

A Yes, I do.

Q Now, the information upon which those beliefs are based, is that the information you have disclosed to Judge Spencer here today or is there other information additionally?

A I think I took my information from being with Timothy for those five days we stayed at the house, things that I didn't know about that was going on, and the way he acted. Things that was said to me personally.

Q Is there anything in specific that you could tell the Judge?

A His emotions. It was like – he made a comment on the telephone, "Don't hurt her. She won't do you no harm." Something in reference to that.

Q When did he make that?

A There was a television – during the week [329] while they was missing, we tried to put it on the local news. They interviewed us at Timothy and Lisa's house. And it was like an appeal made, if anybody knew anything about the whereabouts of Lisa and Shanta, would they let us know. Would they call the police department. And that was one of the things that Timothy said. And I still did not, you know, I didn't focus on it right then. It took me sometime later to go back and look at that interview and why did he say that? Also, he didn't want me – being alone, he didn't like being alone. It looked like he was suspicious.

Q Who did he spend time with?

A With my husband, myself, his mother, and sister. There was always someone with him.

Q Was there anything else specific that you can think of that constituted some of the information you based this belief on?

A Not legally. Just a mother's feeling.

Q Your gut feeling that there was something that you didn't know about?

A My main thing is why was he crying when he walked up my steps at 10:30 at night. It just dawned on me he didn't know – supposedly had not known what was happening or where Lisa was, but he was [330] crying and that bothered me.

Q Did you know at that point what had happened?

A No, I did not. I wasn't crying.

Q Were you upset at that time?

A I was very upset, because that wasn't Lisa's pattern.

Q Was there anything else specific?

A Well, later I found out that drugs and things was going on that Timothy probably was involved with.

Q Timothy was involved in drugs?

A I don't think it was ever – I don't think evidence came out. Nothing like that. But he was with a lot of drug people – let's put it that way – that we personally knew of; they was involved with drugs.

Q He associated with people who were involved with drugs?

A Yes. I think his brother was doing drugs. That was a known fact.

Q How did you know that?

A Lisa had said something earlier to me, then Chesapeake also said something. A young lady came his house that was a drug user to get drugs from Timothy, from his brother.

[331] Q And was there anything, any information that you knew of that tied that to Lisa's death? Any connection between that and Lisa's death that you can explain to the Judge?

A Not that I know of.

Q Anything else, ma'am?

A No.

MR. McLEES: Thank you.

MR. TURNER: Your Honor, I left out one or two small points.

THE COURT: Go ahead.

MR. TURNER: Your Honor, one technical point. Mr. McLees went over a newspaper article with the witness which he had introduced as Respondent's Exhibit P-2. It is just the first page of the article. I have the second page of the article. I'm sure Mr. McLees does. There is just one sentence in there that I would like to get in the record which is not attached to the first page.

MR. McLEES: I would be happy if he wants to put the whole thing in or the sentence, whatever.

THE COURT: Go ahead.

RECROSS-EXAMINATION

MR. TURNER: I can show this to you and we can do this through the witness.

[332] (Document proffered to witness.)

BY MR. TURNER:

Q Ms. Nixon, I've handed you an article which was previously introduced, the first page of which was previously introduced as Respondent's Exhibit P-2 and you had read a portion of that into the record from page one. I am now showing you page two of that article. Would you please read that paragraph that I just pointed to?

A "Meanwhile, the Nixon attorney, Sacks, said he plans to renew his attempt to convince the Court that the Nixons deserve the insurance money."

Q I'll show you the first page that you looked at. Would you state for the record the date of that article?

A The date?

Q Yes, ma'am.

A January 7th, 1986.

Q Thank you. That's all I have on that one. Just one other question, ma'am. In your discussions with Detective Slezak, did anything ever come up about the Naval Supply Center or Naval Exchange concerning the events that had occurred?

A Yes, it did.

Q What was that, ma'am?

[333] A Something about things that was stolen from the exchange.

Q Did that have anything to do with either Timothy Sorrell or your daughter?

A Nothing to do with my daughter. Timothy worked in the same building that this was going on.

Q Did either Detective Slezak or you suggest that Timothy could have been involved in that?

A I did.

Q You did?

A Yes.

Q What did you say about that to Detective Slezak?

A I recalled a conversation that I had with my daughter that some people had been to her house with little radios or tapes, things of that nature. Then I asked him could they check it and see what was going on; that I thought the stuff was stolen from the Navy Exchange. And when I got to Lisa and Timothy's house that night, I saw this little radio that I didn't recognize. And I'm not saying I'm supposed to recognize everything that went on at their house, but I saw a radio. And when the detective came I asked him to check it; that I saw Timothy give some things to his uncle and I wanted to [334] know what it was. And I gave him the uncle's name and they came to the house and they did check and I think they found out that it was stolen merchandise.

Q Prior to her death, did your daughter, Lisa, ever indicate anything, any concern to you about Naval Exchange matter that you have just recited?

A She didn't tell me Navy Exchange. She mentioned a gentleman, a man, someone that Tim knew that worked with him or something that was at the house and she called me up to tell me what was going on. She said, "Mom, there is a man here with some things, and Tim –" I told her to "Tell Tim to tell him to take them out of your house."

Q Was your daughter concerned about the situation?

A Yes. Well, at that phone call, there was a concern, yes.

Q Do you know if she expressed that concern to her husband, Timothy Sorrell?

A No, I don't know.

MR. TURNER: Thank you, ma'am. That's all I have.

THE COURT: You may stand down, ma'am. Thank you very much.

* * *

In the United States District Court for the
Eastern District of Virginia

[Caption Omitted In Printing]

[342] DIRECT EXAMINATION

BY MR. McLEES:

Q You are Detective Michael Slezak who testified yesterday?

A Yes, sir.

Q Let me ask the Marshal to show you a photograph, a copy of which has been admitted as Respondent's Exhibit E of the two young ladies.

A E?

Q Yes. Have you ever seen those young ladies before?

A Yes. It is Lisa and Shanta Sorrell.

Q When did you first see them, Detective?

A December 10th, 1984.

Q And where was that?

A On Cook's Mill Road.

Q And when you arrived at the scene, what did you find when you first saw them?

A The car was – the windows of the car were covered over with soot. We later found there to be soot on the inside.

[343] Q Where were these young ladies with respect to the car?

A Ms. Sorrell, Lisa Sorrell, the adult, was in the front passenger's seat of the right-hand side of the car.

Q The passenger's seat?

A Yes. And Shanta was in the trunk of the car.

Q What was their condition?

A They were both dead.

Q Were you present at their autopsies?

A Yes.

Q Conducted by whom, sir?

A Dr. Pressawalla.

Q In your testimony yesterday, you described the door handle of the car being sprayed over with paint?

A Yes, sir.

Q You described the fire being set with paper and matches and apparently no accelerants.

A Yes, sir.

Q In examining the car and the scene of the crime, were there any other circumstances that you would characterize as indications that the crime had been hastily committed?

A The victims' jewelry, some of her jewelry and [344] necklace, was still on her. I believe there were some gold earrings, a small amount of money in her purse. There was a postal money order for, I believe, $280 in the vehicle.

Q Those things had not been taken?

A No. They were not taken.

MR. McLEES: I have nothing further at this point, Your Honor.

THE COURT: All right.

Detective Slezak, that's the kind of stuff that normally indicates that robbery was not a motive?

THE WITNESS: Well, if nothing was taken, it would, yes, sir.

THE COURT: Mr. Turner?

MR. LEE: I have a question.

CROSS-EXAMINATION

BY MR. LEE:

Q I just have a few questions for you, Detective. Today you have described some of the evidence that you found at the Sorrell scene and yesterday you described evidence found at the Sorrell scene – evidence found at the McClelland scene. You noted some similarities, but you noted many dissimilarities, also. But you explained that that might be an indication that these crimes were [345] committed by a common perpetrator who learned from his first crime how better to commit a second crime Is that right?

A I think that would be a fair summary.

Q Isn't it fair to say that an equally likely explanation, if not a better one, is that these crimes were committed by two different people?

A No, I don't think so.

Q Okay. One other thing that I just want to get clear. Are you certain that at no time after the Coleman Gray trial that you made statements to either Mr. Nixon or Mrs. Nixon or their lawyer that Timothy Sorrell remained a suspect in the Sorrell murders?

A I can't imagine me saying that. There was not a time that I thought – after I saw the photographs of the McClelland murder, there isn't a time that I felt that Mr. Sorrell was responsible for their murder.

Q So as far as you are concerned, all you needed was to compare those two sets of photographs to make the decision.

A No, that's not what I said.

Q Okay.

A I said from the time I saw the photographs, the similarities in those two indicated to me that Mr. Gray was involved. We pursued it, and I am still of [346] that opinion.

MR. LEE: I don't have any further questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. McLEES:

Q Detective Slezak, when you were investigating this crime, what information, if any, did you have with respect to where Lisa Sorrell was going when she left the Nixon's home?

MR. LEE: This is completely outside the scope of cross.

MR. McLEES: It is in response to Your Honor's question, which was after my direct examination.

THE COURT: Go ahead.

THE WITNESS: My understanding was that they were going to Greenbriar Mall. One of the purposes was to have a photograph taken of Shanta Sorrell with Santa Claus.

BY MR. McLEES:

Q All right. Did you have information about how much money they had on them?

A That was never determined. There was some indication that they were going to have a picture [347] taken and do some shopping, but I do not know how much money she was supposed to have.

Q Was there information about the purchase of the money order?

A Pardon me?

Q Do you remember receiving any information about her purchasing the money order?

A I remember a discussion about a money order. And I know that there was a money order in her car that we found.

Q So were you ever able to determine how much money she had had on her person before she was accosted by whoever it was?

A No.

MR. McLEES: Thank you.

THE COURT: All right. You may stand down. Detective Slezak, did you all determine whether or not she actually had the picture taken? Is there any record of her getting to Santa Claus and getting a picture taken?

THE WITNESS: There was no physical evidence that would establish that. There was an individual that we talked to who expressed an opinion about it.

THE COURT: All right. Fine. Thank you.

* * *

In the United States District Court for the
Eastern District of Virginia

[Caption Omitted In Printing]

[395] MICHAEL SLEZAK,

recalled as a witness by and on behalf of the Respondent, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLEES:

Q You are Detective Slezak who has become familiar to us by now in this case?

A Yes, sir.

Q Detective, with respect to information that Timothy Sorrell gave you about his whereabouts on the [396] evening of December 5th?

A Who?

Q Timothy Sorrell. Information that you obtained from other people about his whereabouts and information he gave you about his whereabouts on the evening of December 5th, 1984.

A Yes, sir.

Q Did you investigate that information to see if you could verify it or not verify it?

A Yes.

Q What were the results of your investigation as far as you could construct, reconstruct his whereabouts from what you were given?

A We spent some time trying to determine if an individual had taken a test, I believe at the technical center, part of Tidewater Community College. I believe that Mr. Sorrell said that he had given this individual a ride there. We attempted to find out whether that person took the test. Then Mr. Sorrell said that he went to see Deborah Robinson, who lived in Robin Hood Apartments in the City of Norfolk.

Q Was that the period of time when he normally went to community college or when his class was scheduled but he was at her house?

[397] A Yes. I believe so.

Q And did you contact her?

A Yes, I did.

Q What did you learn from her?

A She said that he was there during that time frame.

Q Did you have any indication that there was an affair or romantic relationship between Timothy Sorrell and Ms. Robinson?

A It had crossed my mind, but Deborah Robinson's husband or boyfriend was present during the interview and he was aware that he had been there.

Q Was he aware that Timothy Sorrell had been there that night?

A I'm not certain about that. I think that he knew, but I can't say with absolute certainty that he knew that night. Certainly he knew when we were there to talk to her.

Q He knew that Timothy had been there when you talked with him?

A Yes.

Q Was there any uneasiness between them about that?

A There didn't appear to be.

Q Did you have, after talking to them, did you [398] have any reason to believe that there was an illicit relationship between Timothy Sorrell and Ms. Robinson?

A I don't recall thinking that. I was curious about him being there that evening, but – I had wondered if her statement to us was the truth. To say that I was satisfied that that was the truth, I would have to say that I was not satisfied with that at that time. I have never found anything that contradicted what she told me.

Q Okay. Did you have any information about Timothy Sorrell's whereabouts earlier in the evening?

A Mrs. Nixon and Mr. Nixon, I believe they told me that he had been at his mother's, that Mr. Sorrell had been at his mother's house that afternoon, earlier that afternoon.

Q What time period was he at his mother's?

A Before 5 o'clock.

Q And from 4:30 to 7, did you have information about where he was?

A My understanding is that he was there, and then took a cousin or a friend, I think his name was Curtis, to either the technical center or to Tidewater Community College. They are across the [399] street.

Q At 7 o'clock for the class?

A That's my understanding.

Q Now, where did Mrs. Nixon get the information that Timothy had been with his mother?

A I think she got it from Mr. Sorrell.

Q Do you know if she spoke to his family?

A Oh, I feel certain she did. That was one of the reasons we communicated, that Mrs. Nixon and I communicated as often as we did, so that I would know what she knew. And she was communicating with members of – with Mr. Sorrell's family.

Q Now, let me switch your attention to the subject of these .32 caliber handguns. It has been mentioned that a .32 weapon was involved in this case. In your experience, are .32 caliber handguns frequently used in crimes in the Tidewater area?

A They have been. Yes.

Q Why? Do you have any opinions why?

A For the most part, .32 caliber guns are inexpensive. We have referred to them as rip guns. They are not accurate, because they are so cheap. If you are not going

to be at close range or stick it in someone's rib, it is not a very good weapon to use.

Q Now, what other common types of calibers of [400] handguns are there in circulation?

A What other calibers?

Q Yes, sir.

A You will find practically – well, you find .22's, .25's, .32's, .38's, .357's, 9mm's, .40 caliber now, .41 calibers, which are fairly unusual the .45's and .44's.

Q With respect to those handguns of larger caliber that you have mentioned, .38's, .40's, 9mm's, .357's et cetera, are they more powerful than a .32?

A Yes, generally speaking they are.

Q Is that an advantage in committing a crime of violence?

A A high-powered gun?

Q Yes, sir.

A Depending on the circumstances.

Q What about the circumstance where a person has method of operation of firing repeated shots into a helpless victim's head at very close range, from inches away?

A A high-powered gun wouldn't be an advantage, no.

Q Would it be any disadvantage?

A It would if you didn't want someone to hear it; it would be a disadvantage. If you were in a [401] situation

where the penetration of the bullet would affect – would have some effect inside a building where it would penetrate the victim and then into a wall, it would be.

Q What do you mean by "penetration"? You mean a high-powered – a bullet from a higher-powered gun is more likely to go through the victim?

A Yes.

Q What happens when it goes through the victim?

A A high-powered projectile would have a tendency to come out.

Q And do what?

A And do additional damage to whatever is around or yourself, or a ricochet, any number of things.

Q They could ricochet and hurt the shooter?

A Yes.

Q Or people with him?

A Certainly.

Q What about if they stuck in a wall or seat of a car or something at the scene of a crime. What would they provide?

A They would provide evidence that would trace the projectile to the victim's serology or DNA. They would also, if you could then match that projectile to the firearm –

[402] Q It would fix where the person was actually shot?

A Yes.

Q Now, are larger caliber handguns generally same size as smaller ones or are they on larger frames?

A Generally speaking, they are on larger frames, but not always. There are some match pistols that, even though they are small caliber, they are on larger frames for added accuracy and operation; the grip, that sort of thing.

Q Would it be fair to assume a gun on a larger frame is more difficult to conceal about one's person?

A Certainly.

Q What about a .22 caliber handgun. You mentioned that's common. That's smaller than .32.

A Yes.

Q Would that – how would that compare with a .32 in penetration power?

A A standard .22 has a higher probability of ricocheting because it has such a high velocity, although the bullet is smaller. It has a long range. But it has a smaller mass, and would have a greater likelihood of ricocheting.

[403] Q Okay. Now, let's suppose that a criminal was perennially in need of cash, wanted to rob and shoot victims in the head at close range, wanted to throw the weapons away, get rid of the weapons as soon as he could afterwards so he wasn't caught with a murder weapon on in his possession, places like water treatment plants or places of that nature so they couldn't be traced to him, what kind of handgun might he logically choose for those purposes?

A A .32 or a .38. They are generally the cheapest.

Q Now let me direct your attention to and ask the Marshal to show you what I think is Petitioner's Exhibit 4, which is the blown-up map.

MR. McLEES: Can I ask the witness to come down and perhaps we can hold the map so Your Honor can see it?

THE COURT: Sure.

(Map displayed.)

BY MR. McLEES:

Q Do you recognize this map? Take a minute to get your orientation.

A Okay, give me just a moment.

Q Certainly.

(Witness perusing document.)

[404] Okay, it appears to be Interstate 64 in Chesapeake, originating a couple miles from Mower's Hill and terminating past the Greenbriar Mall exit near the City of Virginia Beach.

Q Would you just point to the Greenbriar Mall location for His Honor, where Lisa Sorrell disappeared?

A Right over here.

Q And can you locate and point to, for His Honor, to the Deep Creek area where the Sorrell bodies were found in the automobile?

A Right at the end of Cook's Mill Road.

Q And what is the highway that appears to run past them through this section of map?

A Interstate 64. There is an exit here.

Q Now, in relation to what's shown on this map, can you tell His Honor where the Murphy's Mart in Churchland is located, where Mr. McClelland worked and where Ms. Hinkle worked, and Melinda Gray?

A It is not on this map.

Q Where is it in relation to what's shown on this map?

A Well, I'm estimating. The size of the map sort of throws me off. But it would be over in this area.

[405] Q As you are looking at it, to the northwest of what's shown on this map?

A Yes.

Q Okay. Have you driven from the Murphy's Mart in Churchland to Greenbriar Mall and back for the purpose of timing that trip?

A I drove from Murphy's Mart to Greenbriar Mall, and then the return trip, of course, is the same distance.

Q What route did you follow, sir?

A Murphy's Mart sets about a distance of two city blocks from Route 17. It sets back. I drove through the parking lot onto Route 17 and then took Route 17 into the city, or continued into the City of Portsmouth, to Interstate 264. Interstate 264 comes out in this area and then makes a junction with 64 here and then drove 64 out to the mall.

Q And you followed 64 throughout the length of it that's shown on this map?

A Yes, sir. Until I exited onto Greenbriar Parkway, which is right at the mall.

Q And how long did that trip take you?

A 23 minutes, using a digital clock.

Q And of course going and coming, going by 64, you are going right by the Deep Creek area?

[406] A Yes, sir. There is an exit there for it.

Q How far after 64 was the car found, was the Sorrell's car found?

A I would say a mile-and-a-quarter to a mile-and-a-half.

THE COURT: What time of day did you drive it?

THE WITNESS: I believe I started at 2:58.

BY MR. McLEES:

Q What day of the week was that?

A It was a Wednesday in light rain.

Q And of course on the interstate, you are not impeded by traffic lights or traffic jams?

A No, sir.

Q And in fact, if one were at Greenbriar Mall and wanted to get back to Murphy's Mart in Churchland as quickly as they could, what route might they follow?

A If mileage – I'm not certain that this is the shortest route back to Murphy's Mart. If I were going to make the drive to get back, if I was personally trying to get back as quick as I could I would take this route because there is little to impede me. There are other routes that you could take to get there. And if they are quicker, I'm not certain. But certainly there are no traffic lights [407] along the interstate, which would take you back to this area.

Q And if you wanted to make that trip in a hurry and particularly if you wanted to stop and make a shorter stop in the Deep Creek area and get someone back to work in time that they wouldn't be missed, is that a likely or an unlikely route to follow?

A It would be a likely route to follow.

MR. McLEES: That's all the questions I have with respect to the map. You may resume the witness stand.

BY MR. McLEES:

Q Do you know from your conversations with Mr. Gray whether he has been in the Cavalier neighborhood in the Deep Creek location near where the –

A He has been to the Cavalier area.

Q On what occasions?

A He told me he was married there at the community center. And he has a relative that lives in Cavalier. And I believe his wife's family lives in Cavalier Manor.

MR. McLEES: Thank you, sir. I have no further questions.

THE COURT: Any cross?

CROSS-EXAMINATION

[408] BY MR. LEE:

Q Detective, how long did it take you to drive this entire route from Murphy's to Greenbriar, Greenbriar to Cook's Mill, Cook's Mill back to Murphy's?

A As I stated, I only drove it in one direction. It is the same distance heading east as it is west. I didn't make a round-trip.

Q So you drove Murphy's to Greenbriar and Greenbriar to Cook's Mill?

A No, sir.

Q You just drove Murphy's to Greenbriar Mall?

A That is correct. On that occasion. Yes.

Q And it took you 23 minutes?

A Yes.

Q At 2:30 or so in the afternoon?

A No, I left at – I believe it was just before 3 o'clock, and it took 23 minutes. I didn't use a stopwatch. I used a digital clock on the dashboard. So that's accurate within a minute and 59 seconds.

Q What was the purpose of doing this? Why did you do this?

A To see how long it took to get there.

Q Do you ever time the distance from Greenbriar to Cook's Mill?

[409] A No.

Q You never did?

A No.

Q Okay. What about Cook's Mill back to Murphy's Mart?

A No.

Q Okay. And you are not sure if the route you took is the shortest route?

A I believe it is the shortest as far as travel time is concerned. There may be one shorter. It wouldn't – if someone was to ask me what would be the quickest way, then I would pick that because of delays. There is an alternate route and I suppose if you were fortunate enough to catch the bridges down and took the lights just right, you may be able to get there quicker. It is what I believe to be a longer distance, but a quicker route.

Q Did you ever time this route at rush hour?

A I'm sorry.

Q Did you ever time this route at rush hour?

A Which rush hour?

Q Well, let's say between 4:30 and 5:30 in the afternoon?

A No, I timed it that day as it was raining. There was a light rain, and it was on a Wednesday. [410] It was a Wednesday in the rain and I timed it at that.

Q Do you know where Timothy Sorrell was from 4:30 to 5:29 on December 5th, 1985?

A No.

Q Yet you eliminated him as a suspect eventually?

A Well, his whereabouts isn't the only thing that I considered, but there was a time that I personally eliminated him as a suspect, yes, sir.

Q Even though you don't know where he was from 4:30 to 5:29 that night.

A From what time?

Q 4:30 to 5:29 on the evening?

A Yes, sir.

MR. LEE: Thank you.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COLEMAN WAYNE GRAY, Petitioner,	)	
v.	)	Civil Action No. 3:91CV693
CHARLES E. THOMPSON, Respondent.	)	

MEMORANDUM OPINION

(Filed Aug. 25, 1994)

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.[1]

On May 26, 1993, the Court issued a Memorandum Opinion which granted in part, and denied in part, the Petitioner's Motion to Alter or Amend Judgment. An evidentiary hearing was ordered on one claim: whether the introduction of evidence pertaining to the Sorrell murders during the penalty phase of Gray's trial violated

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[1] Mr. Gray also was convicted of Use of a Firearm in the Commission of Murder. He was sentenced to four (4) years imprisonment on this charge.

The claim of error addressed in this Memorandum Opinion relates only to Gray's capital murder charge, and does not affect his other conviction.

the Petitioner's Fourteenth Amendment right to due process.

The parties filed briefs on this issue, and the Court held an evidentiary hearing on April 21-22, 1994. The case now is ripe for adjudication.

I.

The facts surrounding the crimes for which petitioner Gray was convicted are set forth in the Supreme Court of Virginia's opinion on direct review, *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied* 484 U.S. 873 (1987), and in this Court's April 1, 1993 Memorandum Opinion. The salient details may be summarized as follows:

Richard McClelland, the manager of a Murphy's Mart Store in Portsmouth, Virginia, worked from 10:00 a.m. into the evening on May 2, 1985. That night at approximately 9:30 p.m., Coleman Gray and Melvin Tucker parked outside the convenience store. Both were "high" from "free basing" cocaine, and they watched McClelland and a security guard work for a significant period of time.

Shortly before midnight, McClelland and the security guard left the store. Each man got into his own automobile, and both drove to a nearby fast-food restaurant. Gray and Tucker followed the men to the estaurant. McClelland walked inside the establishment to eat; the security guard proceeded to the "drive thru" and picked up his food.

After finishing, McClelland returned to his car, and began driving towards Smithfield, Virginia. Gray and Tucker resumed their pursuit. At a stop sign on the corner of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his car in front of McClelland's and blocked the roadway. Gray, who was brandishing a .32 caliber revolver, forced McClelland out of his car, into Gray's car, and took the victim's wallet. Gray and Tucker then drove McClelland back to the Murphy's Mart Store.

Upon arrival, Gray forced McClelland to open the store. Tucker remained in Gray's car. The two men inside the store opened the safe and filled three bags full of money. After transferring the cash to Gray's car, the men forced McClelland back into the automobile.

Gray then drove to a service station to fill up his car with gasoline. The Petitioner also filled up a gas can which he placed in the trunk of his car. After paying for these purchases, Gray drove to the Frederick Campus of Tidewater Community College. The Petitioner turned onto a side road near the college, and ordered McClelland out of the car. The store manager walked fifteen to twenty feet away from the car, and, pursuant to Gray's order, laid face down on the ground. McClelland begged Gray not to shoot him or harm him in any way. After reassuring McClelland, Gray fired six shots in rapid succession into McClelland's head.

Gray and Tucker then returned to the intersection where McClelland's car was located. In order to destroy this evidence, Gray took the can of gasoline out of his trunk, and covered McClelland's car. After igniting the

fire, the pair returned to Gray's apartment to count the money they had stolen.

Several days later, Tucker took Gray to the Nansemond Treatment Plant, where he worked. Gray threw the revolver he had used to kill McClelland into a contact tank. (Gray later showed the police where he had discarded the evidence and the gun was recovered.)

The police discovered McClelland's body only a few hours after the grisly murder. The autopsy revealed that six close-range .32 caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. *See* Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. *See* Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] *Tr. of 4/21/94* at 76-77.

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[2] None of the Sorrell murder evidence was available for examination.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. *Id.* at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. *See* Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. *Tr. of 4/21/94* at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. *Jt. App. Vol. 1* at 278. Moore based his request on *Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of *statements* Coleman Gray had made about other crimes he had committed. *Jt. App. Vol. 1* at 279. The following conversation transpired:

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[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. *Tr. of 4/21/94* at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. *Id.* at 248.

Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument . . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.

Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record . . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.

The Court: Who is the other murder that we're taking about?

Mr. Ferguson: A murder in California.

The Court: Any name?

Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder . . . The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.

Mr. Moore: **Is it going to be evidence or just his statement?**

Mr. Ferguson: **Statements that your client made.**

Mr. Moore: Nothing other than statements?

Mr. Ferguson: **To other people, that's correct. Statements made by your client that he did these things.**

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. *Tr. of 4/21/94* at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. *Id.* at 97. She had been shot in the head six times by a .32 caliber firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. *See* Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. *Jt. App. Vol. 11* at 996-1001; *Tr. of 4/21/94* at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain *statements* made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the cause of death and the nature and extent of the Sorrell's injuries.

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[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. *Tr. of 4/21/94* at 120.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. *Tr. of 4/21/94* at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. *Jt. App. Vol. II* at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. *Id.* at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. *Id.* at 1056-78; *See* Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time. *Tr. of 4/21/94* at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. *Id.* at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. *See* Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. *Id.* at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. *Id.* at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. *See* Pet. Ex. 1-2; *Tr. of 4/21/94* at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. *Tr. of 4/21/94* at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. *Id.* at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. *Id.* at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. *Tr. of 4/21/94* at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." *Id.* at 218, 238. Such an assertion is patently absurd.[5]

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[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. *Tr. of 4/21/94* at 409.

Finally, Dr. Presswalla, the state medical examiner who performed the victims, autopsies, testified as to the victims' cause of death. *Jt. App. Vol. II* at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. *Tr. of 4/21/94* at 66-67, 86-87; *Jt. App. Vol. II* at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. *Jt. App. Vol. III* at 1137-38. Gray flatly denied any involvement in the Sorrell

murders.[6] *Id.* at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. *Tr. of 4/21/94* at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. *Gregg v. Georgia*, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); *Hutchins v. Garrison*, 724 F.2d 1425, 1429 (*4th Cir.* 1983). The state's act of taking the life of a citizen differs

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[6] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597 (1991); *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114 (1987); *California v. Brown*, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); *Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. *See Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); *Witherspoon v. Illinois*, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); *United*

States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); *Gardner*, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." *Simmons v. South Carolina*, 114 S. Ct. 2187, 2192 (1994) (*citing Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); *Balwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197 (1977); *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing that the Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla – violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in *Smith v. Estelle*, "Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the truth-seeking function of trials.' " 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. *See, e.g., Profitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that

Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. *United States v. Tucker*, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); *Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); *Richardson v. Johnson*, 864 F.2d 1536 (11th Cir. 1989). As the *Gholson* court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced [sic] presented. 674 F.2d at 738 (*citing Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this

local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. *United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984); *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. *See Gardner*, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably

unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States Constitution. The Commonwealth failed to give fair notice of its intention to prove, at the penalty phase of the McClelland trial, that Gray committed two distinct murders with which he had not been arrested for, charged or convicted. Absent the surprise introduction of the Sorrell murder evidence, there is a substantial probability that the result of Gray's sentencing would have been different. Accordingly, the Court will GRANT Coleman Gray a writ of habeas corpus, VACATE the Petitioner's death sentence, and REMAND the cause to the Circuit Court of the City of Suffolk in order that the Petitioner can be resentenced.

An appropriate Final Order shall issue.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES
DISTRICT JUDGE

Date: AUG 25 1994

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLEMAN WAYNE GRAY, *Petitioner-Appellee,* v. CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center, *Respondent-Appellant.*	No. 94-4009
COLEMAN WAYNE GRAY, *Petitioner-Appellant,* v. CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center, *Respondent-Appellee.*	No. 94-4011

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-91-693-R)

Argued: May 3, 1995

Decided: June 28, 1995

Before HALL, WILKINSON, and WILKINS,
Circuit Judges.

Reversed and remanded with instructions to dismiss by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wilkins joined. Judge Hall wrote a concurring opinion.

OPINION

WILKINSON, Circuit Judge:

Coleman Wayne Gray was convicted of capital murder in a Virginia court. Gray exhausted his state remedies and then petitioned for a writ of habeas corpus, alleging, *inter alia*, that his sentencing violated the Due Process Clause. On that ground the district court issued the writ, and the Commonwealth of Virginia now appeals. We reverse and remand with instructions to dismiss the petition.

I.

On the evening of May 2, 1985, Gray and his friend Melvin Tucker drove into the parking lot of a Murphy's Mart department store in Portsmouth, Virginia. They observed the store manager, Richard McClelland, inside. McClelland had recently discharged Gray's wife from her job at the store, thereby displeasing Gray, who told a friend he was "going to get" McClelland. When McClelland left work in his automobile, Gray and Tucker followed. *See Gray v. Commonwealth*, 356 S.E.2d 157, 172 (Va. 1987).

At an intersection, Gray pulled his car in front of McClelland's and blocked the road. Armed with a .32 caliber revolver, Gray ordered McClelland into Gray's car. Gray and his two passengers then returned to Murphy's Mart. While Tucker waited in the car, Gray forced McClelland inside the store at gunpoint. McClelland was told that if he refused to cooperate, his family would suffer. Gray and McClelland then emerged from the store with three sacks of cash containing approximately $12,000. They joined Tucker in the car and departed. *Id.*

Gray drove to a service station and fueled the automobile. He removed a gas can from the trunk and filled it with gasoline as well. Gray then proceeded to a remote dirt road, stopped the car, and commanded McClelland to get out. Gray ordered McClelland to lie face down on the ground. As McClelland did so, he begged Gray not to hurt him. Gray assured McClelland he had nothing to fear, and then fired six bullets into the back of McClelland's head with the .32 caliber handgun. The shooting was execution style: the shots were fired in rapid succession, from a range of three to eighteen inches. Gray told Tucker as they drove away from the murder scene that he had to shoot McClelland because McClelland knew him. *Id.* at 172-73.

The two men then returned to the intersection where they first abducted McClelland. Gray informed Tucker that he intended to burn McClelland's car to destroy the evidence. Gray soaked the interior of McClelland's car with gasoline from the gas can, tossed a lit match into the car, and fled. Gray and Tucker returned to Gray's apartment to count the money. *Id.* at 173.

Both Gray and Tucker were subsequently indicted on various criminal counts. Tucker pleaded guilty to lesser charges in exchange for agreeing to testify against Gray. Gray, however, went to trial for armed robbery, abduction, arson, unlawful firearm use, and capital murder. In a pre-trial motion, Gray's counsel asked the court to appoint a private investigator to assist the defense, but the motion was denied. Gray's counsel also moved for discovery under Rule 3A:11 of the Virginia Supreme Court. The court issued a discovery order pursuant to that Rule and included an additional provision requiring the disclosure of exculpatory evidence.

On Monday, December 2, 1985, the guilt phase of Gray's trial began. Following a motion by the defense under *Peterson v. Commonwealth*, 302 S.E.2d 520 (Va.), *cert. denied*, 464 U.S. 865 (1983), the Commonwealth's Attorney informed the defense of evidence he planned to introduce at the penalty phase to show Gray's future dangerousness. Specifically, he stated that prosecution witnesses would testify that Gray told them he killed a mother and daughter named Lisa and Shanta Sorrell. At the guilt phase, the key issue was whether Gray was the actual triggerman in the McClelland murder. Gray chose not to take the stand but his counsel argued that it was Tucker, not Gray, who shot McClelland, while Tucker asserted just the opposite. Two witnesses for the prosecution, who had been imprisoned with Gray, testified that Gray told them he killed McClelland.

On Thursday, December 5, 1985, the jury convicted Gray on all counts. That evening, the Commonwealth's Attorney informed the defense that at the penalty phase, scheduled to begin the next morning, he intended to offer

evidence of the Sorrell murders in addition to the incriminating statements that he discussed with the defense on Monday. The proposed evidence consisted of testimony by the police detective who investigated the murders, testimony by the state medical examiner who performed the victims' autopsies, and photographs and forensic evidence of the crime scene. Defense counsel interviewed the police detective over the telephone that night.

The following morning, Friday, December 6, the penalty phase began. During an in-chambers conference, Gray's counsel asked the court to exclude the additional Sorrell evidence on the ground that it exceeded the scope of corroborating evidence permissible under state law, and that they were unprepared to rebut it that day. The court expressed the view that the evidence was admissible at sentencing.

At the penalty phase, the prosecution first offered evidence of other criminal acts committed by Gray. That evidence included his criminal record, which the Virginia Supreme Court noted reflected thirteen felony convictions, at least nine of which were for violent crimes. *See Gray*, 356 S.E.2d at 179.

Tucker then took the stand on behalf of the Commonwealth and addressed the Sorrell murders. He testified that shortly after the McClelland murder, he and Gray were scanning the local paper for news of the McClelland investigation. According to Tucker, Gray pointed to a picture of Lisa Sorrell in the paper and declared that he had killed her. At the close of Tucker's direct examination, the defense stated that it had no questions of him. The defense at that time formally moved to exclude the

additional Sorrell evidence, but the motion was denied. The court noted that defense counsel had been informed of the evidence the day before.

The Commonwealth next called Detective Michael Slezak. Slezak testified that he discovered the body of Lisa Sorrell in the driver's seat of a burned-out automobile and found the body of three-year-old Shanta in the trunk. He also testified that an expended match was recovered from the interior of the car: the automobile, like McClelland's, was apparently ignited after the murder. Slezak identified several photographs of the crime scene, which were each admitted into evidence. He offered no opinion on who was responsible for the murders, however. The defense then cross-examined Slezak. The questions emphasized the highly-publicized nature of the Sorrell murders and suggested that due to the possibility of a "copycat crime," the Sorrell and McClelland murders might not have been committed by the same person.

Finally, the Commonwealth called the medical examiner, Dr. Faruk Presswalla. His statements indicated that the Sorrell murders were performed in a manner strikingly similar to that of the McClelland murder. He testified that Lisa Sorrell was killed by six .32 caliber gunshots to the back of her head, and that Shanta died from smoke inhalation. He identified autopsy photographs, which were admitted into evidence. The prosecution also introduced Dr. Presswalla's autopsy report. The defense stipulated to Dr. Presswalla's expert status and declined to cross-examine him.

The defense, in turn, called seven witnesses to present mitigating evidence. They testified largely to their favorable opinions of Gray's character. *Gray*, 356 S.E.2d at 177. Then, Gray himself took the stand. He denied any involvement whatsoever in the Sorrell murders. When asked whether he had anything he wished to say to the jury, he stated that his participation in the McClelland murder was limited to driving the car, and he swore that it was not he who pulled the trigger and killed McClelland.

The court instructed the jury on the aggravating factors under the Virginia death penalty statute – the vileness of the crime charged and the future dangerousness of the defendant. Upon deliberation, the jury unanimously found the existence of both aggravators and fixed Gray's sentence at death.

The Virginia Supreme Court affirmed Gray's conviction and sentence, *Gray*, 356 S.E.2d 157, and the U.S. Supreme Court denied certiorari. 484 U.S. 873 (1987). Gray then instituted state habeas proceedings. The state habeas court dismissed the petition, the Virginia Supreme Court summarily affirmed the dismissal, and the U.S. Supreme Court again denied certiorari. *Gray v. Thompson*, 500 U.S. 949 (1991).

Thereafter, Gray filed the instant petition for a writ of habeas corpus. He alleged numerous constitutional violations with respect to both phases of the trial. The district court held an evidentiary hearing and heard testimony from trial counsel and the prosecution witnesses as to the events at sentencing. Of particular interest to the district

court was Detective Slezak's testimony that Timothy Sorrell, Lisa's husband, had been an initial suspect in the Sorrell murders, although upon further investigation he was not charged. The district court granted the writ and vacated Gray's sentence, finding that the prosecution had "violated the moral standards of fair play embodied in the Due Process Clause" by unfairly surprising the defense with the additional Sorrell evidence. The decision was stayed pending this appeal.

II.

The primary challenges to Gray's sentence involve the aggravating factors found by the jury. Petitioner asserts that the vileness element as applied to him was unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980). He also contends that use of the supplemental Sorrell evidence as proof of future dangerousness was unconstitutional under *Gardner v. Florida*, 430 U.S. 349 (1977). We hold that the district court properly rejected the former claim, but that it erred in issuing the writ based on the latter.

A.

We first address the vileness factor. Virginia law provides that a jury may impose the death sentence if it finds that the conduct "for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2(1). To pass muster under *Godfrey*, a sentencing factor must be sufficiently limited to "channel the sentencer's discretion by

'clear and objective standards' that provide 'specific and detailed guidance.' " 446 U.S. at 428. Even before *Godfrey* was decided, however, the Virginia Supreme Court provided a narrowing construction of the vileness provision. *See Smith v. Commonwealth*, 248 S.E.2d 135, 149 (1978) (defining depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" and aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"), *cert. denied*, 441 U.S. 967 (1979). Here, the court gave the *Smith* definitions to the jury essentially *verbatim*, and the jury found unanimously that Gray's murder of McClelland satisfied the vileness predicate.

We have repeatedly held that limiting instructions based on *Smith* meet the constitutional standard set forth in *Godfrey*. *See Turner v. Williams*, 35 F.3d 872, 891-92 (4th Cir. 1994); *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S.Ct. 27 (1992); *Jones v. Murray*, 947 F.2d 1106, 1117 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir. 1989), *cert. denied*, 495 U.S. 940 (1990); *Turner v. Bass*, 753 F.2d 342, 350-53 (4th Cir. 1985), *reversed in part on other grounds*, 476 U.S. 28 (1986). It is manifest that *Godfrey* does not demand more. *See Turner v. Bass*, 753 F.2d at 353 ("*Godfrey* [does not] require[ ] that a jury be instructed on each term in the aggravating circumstances.").

B.

We next turn to the question of future dangerousness.[1] Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code § 19.2-264.2(1). In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. *Watkins v. Commonwealth*, 331 S.E.2d 422, 435 (Va. 1985), *cert. denied*, 475 U.S. 1099 (1986). This rule of latitude – which also allows the defendant to present a wide range of mitigating evidence – was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976); *see Gray*, 356 S.E.2d at 175 (relying on *Gregg*); *Watkins*, 331 S.E.2d at 435-36 (relying on *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976)).

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[1] Petitioner and the Commonwealth disagree about the effect of a holding that the future dangerousness finding was invalidated by the additional Sorrell evidence. Petitioner contends that it would vitiate the entire sentence, whereas the Commonwealth argues that the sentence could be supported by the independent jury finding of vileness. *See Zant v. Stephens*, 462 U.S. 862, 887 n.24 (1983); *Briley v. Bass*, 750 F.2d 1238, 1245 n.12 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). In view of our disposition of the future dangerousness claim, *infra*, we need not reach this question.

In the instant case, petitioner claims that the future dangerousness verdict is invalid because he was unfairly surprised by the additional Sorrell murder evidence, and that effective rebuttal of the prosecution's evidence was thereby precluded. Petitioner and his counsel knew at the outset of the guilt phase that he would be accused of the Sorrell murders in penalty proceedings, however, and were informed of the additional evidence the night before that phase began. Thus, the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence.

In *Caspari v. Bohlen* the Supreme Court made clear that federal courts *must* analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, if the state so argues. 114 S. Ct. 948, 953 (1994). The district court, however, never acknowledged this mandatory framework in its final opinion. We now address the question, and we find that petitioner's rule would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Because federal courts generally may not create or apply new constitutional rights on collateral review, *id.* at 487, petitioner's claim must fail.

Petitioner relies largely on *Gardner v. Florida*, *supra*, for the proposition that use of the Sorrell evidence violated the Due Process Clause. That case, however, does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case. In *Gardner*, the judge relied on confidential portions of a presentence report in deciding to sentence the defendant

to death, but never disclosed that information to the defense until judgment was entered. 430 U.S. at 353. Because the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain," the sentencing proceeding was unconstitutional. *Id.* at 362.

Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. *See Williams v. New York*, 337 U.S. 241 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner *had* an opportunity to explain or deny the evidence. This case is thus distinguishable from *Gardner* on first principles. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982) (explaining that *Gardner* "simply prohibits the use of 'secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to

the sentencing tribunal."), *cert. denied*, 464 U.S. 1002 (1983).[2]

Gardner itself warned against broad expansions of its holding. Although *Gardner* extended the guarantee of due process to the sentencing context, the extension was carefully circumscribed. The fact that due process applied at sentencing did not transport into that phase of capital proceedings "the entire panoply of criminal trial procedural rights." 430 U.S. at 358 n.9. Notably, there is no right to advance notice of witness statements, much less to evidence that merely corroborates such statements, in federal trials. Witness statements are not discoverable until after the witness has testified on direct examination. *See* 18 U.S.C. § 3500(a). This practice has, to our knowledge, never been found to offend the Due Process Clause. In light of the fact that *Gardner* expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, *Gardner* did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

The district court's justification for relying on *Gardner* is in error. In applying *Gardner* to the facts of this case, the district court cited a passage from *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd on other grounds*, 451 U.S. 454 (1981), in which the Fifth Circuit reasoned

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[2] It follows that this is not a case in which we are asked merely to "apply an extant normative rule to a new set of facts," *Turner v. Williams*, 35 F.3d 872, 885 (4th Cir. 1994), as the rule in *Gardner* does not apply even generally to this case.

that "[s]urprise can be as effective as secrecy in preventing effective cross-examination" and thus denying defense counsel the opportunity to challenge prosecution evidence. *Id.* at 699. The *Estelle* decision was based on *Gardner*. *Estelle*, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. *See Teague v. Lane*, 489 U.S. 288 (1989). Extending the holding of *Gardner*, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the *Estelle* court may have been free to make that leap in extending *Gardner*, such analysis is no longer permissible on collateral review. *See Caspari*, 114 S. Ct. at 957.

Not only is petitioner's position not mandated by *Gardner*, but other precedent existing at the time his conviction became final counsels affirmatively against it. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Supreme Court held that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* at 559. As *Weatherford* explains, *United States v. Brady*, 373 U.S. 83 (1963), created a constitutional right to exculpatory evidence, but not to all information that might be helpful in preparing for trial. 429 U.S. at 559; *see also United States v. Agurs*, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense."). Here, the prosecution had already responded to the *Brady* segment of the pre-trial discovery order when the defense requested the penalty evidence. Beyond that, *Weatherford* reiterates,

" 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " 429 U.S. at 559 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). The federal circuits have taken their cue from this precedent and have narrowly construed the requirements of due process in the context of discovery challenges. *See e.g., United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986); *United States v. Kendall*, 766 F.2d 1426, 1440-41 (10th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980). Thus, rather than deeming petitioner's claim to be iron-clad, a reasonable jurist might well have found that the Supreme Court and several circuits had affirmatively rejected arguments similar to petitioner's.

The practical import of the rule sought by petitioner underscores its novelty. If the Due Process Clause entitled defendants to some minimum advance notice of ancillary evidence, federal courts would be thrust deep into state criminal proceedings. The general scope of discovery at such trials, however, represents precisely the type of question that has traditionally been left to the states. *See Herrera v. Collins*, 113 S. Ct. 853, 864 (1993). Here, for instance, the prosecution notified the defense of its penalty evidence, including Gray's incriminating statements, not pursuant to any perceived mandate of due process but according to Virginia's "preferred practice." *Peterson v. Commonwealth*, 302 S.E.2d at 526 (prosecution may proffer evidence of unadjudicated criminal conduct to show future dangerousness, but "[i]n fairness to the defendant- . . . the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty"). State practices of criminal

(8)

No. 95-6510

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In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J.D. NETHERLAND,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

WHETHER THE COMMONWEALTH'S DISINFORMATION REGARDING DETERMINATIVE SENTENCING ISSUES VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II.

WHETHER THE COMMONWEALTH'S SUPPRESSION OF EXCULPATORY, MATERIAL INFORMATION SHOWING THAT SOMEONE OTHER THAN PETITIONER COMMITTED THE UNADJUDICATED HOMICIDES RELIED UPON BY THE COMMONWEALTH AT THE SENTENCING PHASE OF PETITIONER'S TRIAL VIOLATED THE CONSTITUTIONAL RULES REFLECTED IN *BRADY V. MARYLAND*?

III.

WHETHER INVOKING WELL-ESTABLISHED DUE PROCESS PRINCIPLES PROHIBITING STATE ACTION WHICH AFFIRMATIVELY MISLEADS A DEFENDANT REGARDING THE DETERMINATIVE ISSUES IN HIS CASE CREATES A NEW CONSTITUTIONAL RULE?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995), and is set forth in the Joint Appendix at 354-75. The opinion of the United States District Court for the Eastern District of Virginia is unreported and is set forth in the Joint Appendix at 335-53. The opinion of the Virginia Supreme Court on direct appeal is reported as *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987), *cert. denied*, 484 U.S. 873 (1987), and is set forth in the Joint Appendix at 57-109.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1995. Rehearing was denied on July 25, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

The writ of habeas corpus was granted by the district court because the prosecution "ambushed" Petitioner's counsel at capital sentencing regarding the pertinent issue it would present about a notorious unadjudicated double homicide, and

because the prosecution's disinformation regarding the crippling sentencing issue denied Petitioner a meaningful opportunity to expose the truth. *Gray v. Thompson*, No. 3:91CV693, slip op. at 13-15 (E.D. Va. August 25, 1994); J.A. 348-51.[1] In fact, at every turn the Commonwealth thwarted Petitioner's ability to obtain a reliable sentencing determination. Not only did the trial court deny defense requests for investigative and expert services, but also the prosecution both deliberately misled Petitioner's trial counsel about a determinative sentencing issue and withheld material, exculpatory information which would have completely undermined the evidence it did present. The district court correctly determined that "Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the due process clause of the Fourteenth Amendment of the United States Constitution." *Id.* at 17; J.A. 352.

Petitioner was convicted of the murder of Richard McClelland. On May 2, 1985, police found McClelland's body in a rural area of Suffolk, Virginia. He had been shot six times in the head at close range with a .32 caliber weapon. His partially burned automobile was found several miles away. Petitioner and Melvin Tucker were both charged with capital murder. The district court noted that "[p]erhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder." J.A. 339. For example, Petitioner admitted to police his own involvement in the McClelland abduction, but emotionally insisted both that " 'the man wasn't supposed to die' " and that "Melvin Tucker was the person who shot McClelland." *Gray v. Commonwealth*, 356 S.E.2d 157, 162 (Va. 1987); J.A. 63-64. Tucker said that Petitioner shot the victim. Commonwealth's Attorney C. Phillips Ferguson entered into a

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[1] References to the Joint Appendix will be designated "J.A.". References to the pre-trial, trial and sentencing record will be designated "R.".

plea bargain with Tucker: in exchange for Tucker's testimony, the Commonwealth agreed not to seek the death penalty against him. *Gray v. Thompson*, No. 3:91CV673, slip op. at 4-5; J.A. 339. Based on Tucker's testimony, and testimony from several other jailhouse informants, the jury convicted Petitioner of McClelland's murder.[2]

A separate, double homicide – "one of the most highly publicized crimes in the history of the Tidewater, Virginia area," *id.* at 6 (J.A. 341) – occurred in neighboring Chesapeake, Virginia, five months before the McClelland crime. Lisa Sorrell was found dead in her partially burned automobile. She had been shot six times in the head at close range with a .32 caliber firearm. Her three-year-old daughter, Shanta, was found in the trunk of the car, dead from carbon monoxide poisoning as a result of the fire.

The day the McClelland trial began, Ferguson told the trial court and defense counsel that if Petitioner was convicted of McClelland's murder he planned at sentencing to

---

[2] Three other prison inmates also testified against Petitioner, saying that he had, in varying degrees, confessed to them that he had killed McClelland. "The Commonwealth relied in large measure upon the testimony of Tucker and the other three prison inmates to establish that Gray actually perpetrated McClelland's murder." *Gray*, 356 S.E.2d at 174; J.A. 95.

Two inmates testified that Petitioner admitted tying up McClelland and shooting him. R. 727, 862. In fact, McClelland had not been bound before he was shot, although television and newspaper accounts reported that he had been. R. 740, 1241. A third inmate testified that he heard Petitioner admit to another inmate, Carl Bond, that Petitioner was the triggerman in McClelland's murder. R. 841-49. Defense counsel learned of Bond only through this testimony during trial. Counsel subsequently subpoenaed Bond, who testified that he had been incarcerated next to Petitioner but that Petitioner had always maintained that Tucker was the triggerman. R. 904. Bond also testified that he had told "a member of the Suffolk law enforcement agency" several weeks earlier that Petitioner had only professed that he was *not* the triggerman. R. 911. The Commonwealth knew, but did not tell the defense, that Bond would contradict their jailhouse snitch witness. R. 913-17.

introduce inmate testimony that Petitioner had said he killed the Sorrells. Ferguson pledged and promised that he would introduce no other evidence about the Sorrell murders – only Petitioner's alleged statements to inmates would be at issue. *Id.* at 6; J.A. 341. Tucker, it turns out, was the inmate the Commonwealth planned to present.

On the day of the sentencing trial, however, Ferguson advised the trial court that he would introduce other evidence in support of his effort to prove that Petitioner committed the Sorrell murders, including medical examiner testimony, autopsy photographs of the victims, and police officer M.I. Slezak's testimony about the circumstances of the murders. Defense counsel "clearly and justifiably were shocked" by Ferguson's "tactics," *id.* at 14, 15, 17 (J.A. 350, 352), but "[d]espite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders." *Id.* at 8; J.A. 343. The district court found that Ferguson's decided tactic was to withhold the fact that he would introduce this evidence so as to "surprise Mr. Gray's attorneys." *Id.* at 13; J.A. 348.

The surprise was devastating:

> Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. . . . [T]he evidence of the police officer [Slezak] and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

Gray, 356 S.E.2d at 176; J.A. 98-99.

In addition to being untruthful about the issues to be litigated at sentencing, Ferguson did not disclose an entirely different and exculpatory issue: that, until the Commonwealth turned its attention to Gray, Timothy Sorrell, Lisa Sorrell's husband, was the Commonwealth's only serious suspect in her death. Unknown to the defense but well known to Officer

Slezak, Timothy Sorrell had several motives and the opportunity to kill his wife, and no alibi. In addition, substantial evidence pointed to Timothy Sorrell's guilt, including statements he had made to others shortly before the murder that he wanted his wife killed. *See* Statement of the Case, sub-section J.2.b., *infra*. In fact, Slezak had approached the Chesapeake Commonwealth's Attorney seeking to indict Timothy Sorrell for the murders. *See id.*

The district court granted habeas corpus relief because Commonwealth's Attorney Ferguson's tactics, and their consequences, undermined confidence in the result of the sentencing proceeding. Ferguson "ambushed" counsel with police officer and medical examiner testimony and did not provide a meaningful opportunity for Petitioner to expose the truth. *Gray*, No. 3:91CV693, slip op. at 15; J.A. 351. With Slezak's withheld Timothy Sorrell evidence, Petitioner would have been able to show that Tucker – the Commonwealth's pivotal guilt/innocence and sentencing witness – was utterly unbelievable.[3] "Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the due process clause of the Fourteenth Amendment of the United States Constitution," *id.* at 17; J.A. 352, and the district court's order granting relief should be reinstated.

A. Pre-trial McClelland Hearings: No Defense Investigator and Commonwealth's Attorney Ferguson Vowed to Provide *Brady* Material.

The trial court appointed James A. Moore and Carl E. Eason to represent Petitioner. R. 15-16. Defense counsel sought the assistance of an investigator. At Prosecutor Ferguson's urging, the trial judge denied the request. R. 70. Counsel also sought all exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Ferguson stated, "We

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[3] "Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders." *Id.* at 16; J.A. 352.

are certainly willing to give defense counsel whatever he's entitled to as it relates to . . . the *Brady* case." R. 73.

B. On the First Day of Trial, Ferguson Announced that He Would Present Inmate Testimony that Petitioner Had Confessed to a Double Homicide – the Sorrell Crime – for Which Petitioner Had Not Been Charged; Ferguson Pledged Not to Introduce Any Other Evidence Regarding Sorrell.

At an in-chambers hearing immediately before Petitioner's guilt-or-innocence trial began on December 2, 1985, defense counsel asked the court to direct Ferguson to disclose the issues that he would raise at sentencing if Petitioner were convicted. R. 280. Specifically, counsel asked whether the Commonwealth intended to put at issue who had committed the Sorrell murders. *Id.* Ferguson responded that Petitioner's purported statements to other inmates about the Sorrell crime and about a murder in California would be at issue at sentencing. R. 281. The following discussion ensued:

> MR. MOORE: Is it going to be evidence or just his statements?
>
> MR. FERGUSON: Statements that your client made.
>
> MR. MOORE: Nothing other than statements?
>
> MR. FERGUSON: To other people; that's correct. Statements by your client that he did these things.

R. 282.

C. After Conviction and Immediately Before Sentencing, Ferguson Switched the Sorrell Issue from Alleged Confessions to Modus Operandi.

The jury found Petitioner guilty late in the afternoon of Thursday, December 5, 1985. The next morning, again at an in-chambers hearing, defense counsel advised the court that "the Commonwealth has admitted, has given us the suggestion that he intends to put evidence on of the photographs of the victims of [the Sorrell] murder as well as other evidence

of that murder." R. 996. Defense counsel stated that they received notice of this the previous night, when

> for the first time [the Commonwealth's Attorney] made known to us . . . that he intends basically to put on evidence to try or go a long ways in trying another murder. This is the first time that Mr. Eason and I heard that he would do anything other than put on inmates' statements, supposed inmates' statements, that our Mr. Gray had made to fellow inmates that he killed the Sorrells. . . . [W]e were prepared for that, argumentatively and evidentiary-wise. However, we are not prepared to rebut, put on any rebuttal evidence because of the shortness of notice. We are not prepared to try the Sorrell murder today. We have not been given sufficient notice.

R. 997-98; *see also* R. 1000 ("We are not prepared for any of this, other than he may have made some incriminating statements.") The court ruled that the Commonwealth could pursue these new issues. R. 1001.

At sentencing, Ferguson introduced the testimony of an inmate who said that Petitioner told him in jail that he had been involved in a California murder. R. 1036.[4] Then Tucker testified. He stated that while he and Petitioner were looking through a newspaper at Petitioner's apartment after the

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[4] The Commonwealth introduced no other evidence about Petitioner's supposed connection to this murder. Petitioner testified that he was not guilty of the California murder and that he had been tried and found not guilty. R. 1138-39. A later presentence report confirmed that Petitioner was acquitted of the California murder by a jury. R. 1527. Indeed, at the January 27, 1986 presentence hearing before the trial court judge, Ferguson, who had argued to the jury that this allegation further demonstrated Gray's future dangerousness, noted that "[o]f course, [Petitioner] was acquitted of the [California murder] so I'm not sure whether it makes a whole lot of difference" with respect to sentencing. R. 1587.

McClelland crime, they saw an article about the Sorrell murders and Petitioner said that he had "knocked off" Lisa Sorrell. J.A. 22-23.[5] No other evidence connected Petitioner to the Sorrell crime.

After Tucker's testimony, defense counsel renewed the motion to exclude further evidence about the Sorrell murders:

> And as I have tried to argue to the Court earlier in this trial today, we have had no notice of this, *short of the last twenty-four hours we have had notice of it*. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. . . . *[The d]efense was taken by surprise*. And the jump from Mr. Gray's statement to the co-defendant – and that's all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. *It's too great a jump, too broad a jump*. . . .

J.A. 25-26 (emphasis added).

Ferguson replied that defense counsel knew that the Sorrell murders would be at issue, but acknowledged that he had said that this aspect of the hearing would only involve whether "this defendant has confessed to other crimes involving murder specifically the Sorrell murder." J.A. 26. Ferguson argued that testimony and evidence about the Sorrell homicides beyond Tucker's testimony was critical because "this evidence goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing" vis-a-vis "future dangerousness." J.A. 26-27.

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[5] Tucker did not report Petitioner's alleged statement to law enforcement authorities until Slezak, the chief investigating officer in the Sorrell case, urged Tucker's lawyer to ask Tucker whether Petitioner had made any statements regarding the Sorrell murders. J.A. 206-08. Only after this prompting, which occurred shortly before trial, did Tucker "remember" Gray's alleged remark.

Defense counsel countered:

> MR. MOORE: [T]he Commonwealth . . . has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.
>
> But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.
>
> My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that. So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.
>
> THE COURT: Well, gentlemen, you were aware of it yesterday.
>
> MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

J.A. 27-28.

D. Contrary to What Defense Counsel Had Been Promised, Ferguson Was Allowed to Litigate the Issue of Whether the Uncharged Sorrell Crime Was "Identical" to the McClelland Crime.

Tucker was the nexus between Petitioner and the Sorrell homicides. On this thin reed, and contrary to what the Commonwealth had promised would be the issue (*i.e.*, Tucker's credibility), the trial court allowed Ferguson to introduce all of the forensic evidence gathered by the Chesapeake Police

Department regarding the Sorrell murders. The Commonwealth then argued a new issue: that the *modus operandi* of the Sorrell killing was the same as the McClelland killing.

First, the Commonwealth called Officer Slezak, who had investigated the Sorrell murders. Slezak testified that he found Lisa and Shanta Sorrell in a burned and abandoned automobile in Chesapeake, Virginia. The car was blackened by smoke and Lisa Sorrell was dead in the front passenger area; Shanta was found dead in the trunk. J.A. 29-30. Through Slezak, the Commonwealth introduced photographs of the burned interior of the car with Lisa Sorrell's body, Shanta Sorrell in the trunk, Lisa Sorrell's body after it was removed from the automobile, and Lisa's and Shanta's bodies during autopsies.[6]

Dr. Faruk Presswalla, the state medical examiner who performed the Sorrell autopsies, also testified. He stated that Shanta, "a baby, three years old," died of carbon monoxide poisoning caused by a fire. J.A. 42. He described in great detail the six gunshot wounds to the back of Lisa Sorrell's head. J.A. 44-45, 47. He also displayed an autopsy photograph other than the ones introduced through Slezak.

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[6] The Commonwealth introduced photographs of McClelland's burned automobile and the bullet wounds to the back of his head during the guilt/innocence proceedings. *See* Exhibits 3, 6, 14A-D, 15A-B, 16-17 and 37-41. The Commonwealth introduced parallel evidence about the Sorrell crime. Exhibit 46 showed the driver's side of the Sorrell car, with an empty baby seat. Exhibit 48 was a 5x7 color photograph of Lisa Sorrell's body at the crime scene, showing fire damage to the vehicle. Exhibit 50 was a 5x7 color photograph of Shanta Sorrell's body in the trunk of the car. Exhibit 51 was a 3x5 color autopsy photograph of Lisa Sorrell, showing her upper body and face. Exhibit 52 was a 3x5 color autopsy photograph of Shanta Sorrell. Exhibit 53 was a 3x5 color autopsy photo of Shanta Sorrell. Exhibit 55 was a close-up, 5x5 color autopsy photograph of Lisa Sorrell with a portion of her head shaved to show five gunshot wounds.

E. Petitioner Testified that He Participated in the McClelland Crime but Swore that Tucker Had Killed the Victim; Petitioner Denied that He Had Any Connection to the Sorrell Homicides.

After the Commonwealth rested,[7] Petitioner testified that he participated in the McClelland murder. He took responsibility for what he had done, but insisted that he was not the triggerman in McClelland's murder. R. 1138. He stated that Tucker had assured him that the victim would not be harmed but that Tucker then shot McClelland while Petitioner remained in his car. R. 1145-46. Petitioner flatly denied any involvement in the Sorrell murders. R. 1138.

F. The Commonwealth Argued that Petitioner Should Be Sentenced to Death Based Upon Identical Twin Homicides – McClelland and Sorrell.

In closing argument, Ferguson argued that the circumstances of the Sorrell killings matched the signature of the McClelland killing and because the jury had convicted Petitioner of one of the murders, Petitioner was also guilty of the other. Ferguson recounted Tucker's and Slezak's testimony, noted that the Sorrell automobile was set on fire "just like the one in the Richard McClelland case," and argued that "the method of execution" of Lisa Sorrell was "identical to the Richard McClelland case." J.A. 51. He characterized the crimes as "brutal *systematic* execution-style crimes." J.A. 52 (emphasis added). He said that Petitioner "committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter." J.A. 53.

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[7] The Commonwealth introduced additional evidence in aggravation, the hallmark of which was inmate testimony that Petitioner had confessed to various crimes.

G. The Virginia Supreme Court Affirmed Petitioner's Death Sentence Based upon the Signature Crime Issue.

In its Brief to the Virginia Supreme Court, the Commonwealth argued that the "signature crime" issue justified affirming Petitioner's death sentence:

> [E]vidence concerning the Sorrell murder revealed that Mrs. Sorrell was also killed by six gunshot wounds to the head. The vehicle in which Mrs. Sorrell's body was found had been burned, and her three-year old daughter, Shanta, was found in the trunk.
>
> . . . .
>
> As defendant would undoubtedly agree, testimony from Melvin Tucker, standing alone, may not have been sufficient to convince the jury that the defendant committed the Sorrell murders[8]. . . . In combination, the forensic evidence, photographs, and the investigating officer's testimony revealed that the Sorrell murders were accomplished in a manner *very similar* to the McClelland murder. . . . Such *evidence of similarities* corroborated Tucker's report of the defendant's admission. Information about the particulars of the crime was also relevant and highly probative of the defendant's propensity to commit violent acts in the future.

Brief of Appellee at 10-11, 14 (emphasis added) (citation omitted); *see also id.* at 60 ("[T]his Court should also note that defendant's perpetration of the Sorrell murders is *particularly indicative* of future dangerousness. The execution-style killing of Lisa Sorrell was *remarkably similar* to the killing of McClelland.") (emphasis added).

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[8] The Commonwealth conceded that "Melvin Tucker was subjected to extensive impeachment." Brief of Appellee at 38.

The Virginia Supreme Court relied heavily on Slezak's and Presswalla's testimony and accompanying exhibits to affirm Petitioner's death sentence. Tucker was the only connection between Petitioner and the Sorrell crime and the linchpin of the Commonwealth's guilt/innocence case that Petitioner shot McClelland. According to the Virginia Supreme Court, Slezak's and Presswalla's testimony corroborated Tucker's vulnerable testimony by showing that the "Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder." J.A. 98.

H. The Commonwealth Successfully Argued in State Habeas Corpus Proceedings that the Sorrell Claim Had Been Decided on Direct Appeal and that, In Any Event, Based upon the Virginia Supreme Court's Interpretation of *Zant v. Stephens*, Any Error in the Admission of Sorrell Testimony Could Not Affect Petitioner's Sentence.

Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court for the City of Suffolk on July 7, 1988. In Claim IX, he alleged that the "Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use." Habeas Petition at 39. Petitioner requested an evidentiary hearing. *Id.* at 63.

The Commonwealth argued that Claim IX was not reviewable because it had been "raised at trial and on direct appeal to the Supreme Court of Virginia." Brief in Support of Motion to Dismiss at 7; *see also* State Habeas Hearing at 5, 13. The issue was thus "settled," and the prior treatment of the claim "conclusive." *Id.*[9] Respondent also argued that the

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[9] The Commonwealth conceded that Petitioner had earlier properly raised the issue: "[O]bjection was made [at trial] to the introduction of much of the evidence regarding the Sorrell murders based upon claimed short notice and insufficient time to prepare." Brief in Support of Motion to Dismiss at 20.

Petition should be dismissed without a hearing because "a valid aggravating circumstance remains, even if the future dangerousness predicate is disregarded. *Zant v. Stephens*, 462 U.S. 862 (1983); *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985)." Brief in Support of Motion to Dismiss at 19; *see also* State Habeas Hearing at 44-45.[10]

At the August 22, 1989, state habeas corpus hearing, Petitioner argued that the issue of the "introduction of the testimony and the evidence concerning the Sorrell murders in Chesapeake . . . require[s] further evidence" to "establish the fact that [it] did likely have an effect on the jury." J.A. 114-15. Nevertheless, on April 12, 1990, the habeas court denied the Petition, expressly "adopt[ing] the argument presented by the respondent" on Claim IX. Order at 2.

Petitioner appealed, contending that the habeas corpus court erred in dismissing Claim IX as "procedurally barred by prior adjudication at trial and on direct appeal." Petition for Appeal at 4. The Commonwealth responded that the claim properly had been rejected on direct appeal. Brief in Opposition to Petition for Appeal at 16-17, 21. On November 1, 1990, the Virginia Supreme Court entered an order stating that "upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of." Order at 1.[11]

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[10] This Court unanimously rejected the Commonwealth's interpretation of *Zant v. Stephens* in *Tuggle v. Netherland*, 116 S. Ct. 283 (1995).

[11] The Commonwealth moved for rehearing, warning the Virginia Supreme Court that it had ruled on the merits but that the words "denied for reasons of procedural default" would "foreclose federal habeas corpus review" and thus "promote a speedy and efficient end to litigation." Motion for Rehearing at 2. The Virginia Supreme Court granted rehearing and, like the circuit court, denied relief on Claim IX because it had been raised on direct appeal. J.A. 126. Petitioner filed a rehearing petition arguing that the rehearing motion filed by the Commonwealth was not provided for in the Rules of Court, which the Virginia Supreme Court denied.

I. The Habeas Corpus Petition Filed Below and Respondent's Continued Refusal to Disclose.

In his petition for writ of habeas corpus filed in the federal district court, Petitioner alleged that:

> The Commonwealth did not disclose its intentions to use the Sorrell murders as evidence against Gray until such a late date that it was impossible for Gray's defense counsel reasonably to prepare or defend against such evidence at trial. Because of the late notice, coupled with the trial court's refusal to make funds available for a private investigator, Gray could not adequately prepare to defend his innocence regarding the Sorrell murders. . . . At the time of Gray's trial the Chesapeake police had Timothy Sorrell, the husband of Lisa Sorrell, under investigation for these murders. Although the police had reasons to believe that persons other than Gray committed the murders, this exculpatory evidence was never released to Gray.

Petition for Writ of Habeas Corpus, Ground A at 21, 22. Petitioner moved for discovery concerning the investigation of the Sorrell murders.[12]

The Commonwealth opposed the discovery request, contending that it was not sufficiently specific. Brief in Support of Respondent's Opposition to Petitioner's Motion for

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[12] Petitioner asked for the Commonwealth to identify: 1) all persons with any knowledge regarding the investigation of the Sorrell murders; 2) all persons investigated by the Chesapeake police for the Sorrell murders; 3) all persons arrested, indicted or convicted for the Sorrell murders; 4) all persons interviewed, questioned or interrogated regarding the Sorrell murders, including but not limited to, all suspects, witnesses or investigators; and 5) all reports, documents or summaries prepared by or for the Commonwealth or its counties or cities regarding the Sorrell murders.

Discovery at 5.[13] Having thereby failed to provide *Brady* material, upon a direct request, for at least the second time – the first being at trial – the Commonwealth alleged that Petitioner should have obtained and presented in state post-conviction proceedings the very information the Commonwealth continued to withhold. Brief in Support of Respondent's Opposition to Petitioner's Motion for Discovery at 2. The upshot of the Commonwealth's successful secrecy, Respondent contended, was that Petitioner had "defaulted" the so-called *Brady* aspect of the Sorrell issue.

Petitioner pointed out that he had raised at trial, on appeal, and in state habeas corpus proceedings the "denial of Gray's constitutional rights . . . resulting from the Commonwealth's introduction at the sentencing phase of his trial of evidence purporting to show that Gray committed . . . the Sorrell murders." Memorandum in Response to Respondent's Opposition to Petitioner's Motion for Discovery at 2. Petitioner argued that the evidence sought through federal discovery was "germane to Gray's general constitutional attack on the Sorrell evidence." *Id.* Petitioner further noted that *Brady had* been raised in state court when, pre-trial, Petitioner requested *Brady* material and the Commonwealth promised to provide it. *Id.* at 5. Petitioner also detailed how Slezak and Lisa Sorrell's parents had refused to cooperate with, or even speak with, Petitioner's counsel. *Id.* at 8-9.

Petitioner sought appointment of an investigator in federal court "[b]ecause Gray's counsel had no notice from the Commonwealth that it intended to introduce [Sorrell] evidence at trial [and] Gray was effectively denied any ability to interview witnesses, investigate the Sorrell murders and prepare a defense on behalf of Gray for presentation at the sentencing phase." Memorandum in Support of Motion for Appointment of Expert Assistance at 4. The Commonwealth

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[13] The Commonwealth also argued that it had a "compelling interest" in not disclosing whether the Commonwealth had considered Timothy Sorrell a suspect in the Sorrell murders, even though the Commonwealth had sentenced Petitioner to death by contending that Petitioner committed that crime. Opposition to Petitioner's Motion for Discovery at 5.

opposed this request, arguing that Petitioner needed not an investigator, but "disclosure of whatever information was allegedly wrongfully withheld." Brief in Support of Respondent's Opposition to Petitioner's Motion for Appointment of Expert Assistance at 7. On October 19, 1992, the federal district court granted Petitioner's motion for an investigator, and on October 27, the court granted limited discovery, ordering the Commonwealth to identify all persons arrested, indicted or convicted for the Sorrell murders and all persons who interviewed, interrogated, questioned, examined or obtained a statement from Petitioner regarding his alleged involvement in the Sorrell murders. On November 9, 1992, the Commonwealth filed a Motion for Relief from and Objection to Discovery Order. The Commonwealth argued that the question of whether the Commonwealth withheld information of other suspects in the Sorrell case was procedurally defaulted. Brief in Support of Respondent's Motion for Relief from and Objection to Discovery Order at 7-9.

On December 7, 1992, Judge Spencer held a hearing on the Commonwealth's motion for relief from the discovery order. At the hearing, Petitioner's counsel stated that federal discovery had been sought "on the overall due process claim, that indeed has been pursued at all levels." December 7, 1992 Hearing at 21. At the conclusion of the hearing, Judge Spencer stated:

> Well, the Court, in initially allowing the discovery, did not grant the discovery lightly. I took a long, long time and agonized over it. And I thought that I had fairly resolved the matter by granting what in my estimation was limited discovery. Because this is a case that at least created some nagging doubt in my mind, and I think it needed to be resolved. And I still do. . . . Because this just, reading the entire matter, it gave me pause. *I just had a feeling that I didn't like about the government's behavior*[14] or the

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[14] Judge Spencer's "feeling" likely derived both from his extensive experience on the district court bench – having served since 1986 and in

> possibility of the government's behavior in this matter, and it was submitted to my sound discretion and I gave it the best reasoned analysis that I could. And I think discovery is still in order. . . . I do know that if some of these allegations are made out, I would have some problems with it.
>
> So I am going to at least give Mr. Gray that opportunity. *On the Sorrell matter, particularly as it relates to sentencing, it just seems to me it would be very hard to say something like that didn't have an impact, an extremely negative impact.*[15] Well, this is something that I will have to look at another day. But discovery will go on.

Id. at 32-33 (emphasis added).

The Commonwealth responded to the interrogatories via Slezak, who said: "No one has been arrested, indicted or convicted for the Sorrell murders." Answers to Interrogatories at 1-2.[16] The Commonwealth also filed a motion to dismiss, arguing that Petitioner's claim that the Commonwealth had intentionally misled him about the sentencing issue regarding the Sorrell crime was simply a complaint about "inadequate notice," not state misconduct. With the claim thus framed, the Commonwealth argued that the Constitution does not require notice of individual items of sentencing evidence and, if it did, that would be a new rule barred by *Teague v. Lane*, 489 U.S. 288 (1989). Brief in Support of Motion to Dismiss at

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that capacity handled a number of capital habeas corpus cases as well as having presided over a federal capital trial – and his experience as a prosecutor, having served as an assistant United States Attorney for eight years prior to his appointment.

[15] This comment echoes state habeas corpus counsel's plea for an evidentiary hearing in state court. Counsel argued that the Sorrell claim "require[s] further evidence" to "establish the fact that [it] did likely have an effect on the jury" and that "we can establish the likelihood of such an effect." J.A. 115-16.

[16] Slezak did not mention in his answer that he had discussed with the Chesapeake Commonwealth's Attorney seeking an indictment against Timothy Sorrell for the murders.

18-19. Respondent conceded that *Teague* would not bar relief if the Commonwealth had withheld exculpatory evidence, but contended that the *Brady* issue was distinct from the "notice" issue, had not been presented in state court, and was procedurally barred. *Id.* Finally, the Commonwealth argued that "reports to the police that someone else committed the crime are not necessarily material or exculpatory." *Id.* at 21.[17]

On April 1, 1993, the district court granted the Commonwealth's motion to dismiss. Petitioner filed a Motion to Alter or Amend the Judgment, indicating that entry of the Order was a surprise in light of the fact that court-ordered investigation and discovery was ongoing. Motion to Alter or Amend at 7. The court amended its judgment and ordered an evidentiary hearing because "the Court did not address Gray's claim . . . that the admission of evidence during the penalty phase pertaining to the Sorrell murders violated Gray's due process rights (the 'Sorrell claim'). The Court will amend its Final Judgment by finding that such claim was consistently raised in the State courts and is not procedurally defaulted." Memorandum Opinion on Order Denying Judgment at 3-4.

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[17] Counsel for Respondent later argued that "the application of the *Brady* principle in this circumstance to simple testimony of unadjudicated misconduct in the penalty phase of the trial, I'm not sure that has been decided; that *Brady* applies in this context. And we submit that it doesn't and object to the evidence on that ground." Transcript of Evidentiary Hearing at 16. Ferguson testified below regarding his understanding of *Brady*:

> I'm not saying in this case that there might not have been some discussion on Timothy Sorrell. What I am saying is, when this man and when this evidence was put on at the trial of this case, I was convinced, Detective Slezak was convinced, that Coleman Gray was the killer of the Sorrells. That's what I'm telling you . . . I'm not aware of evidence in this case that the other person did commit the crime. And to my knowledge, the man was never charged and, in fact, was cleared by the Chesapeake Police Department. That is not exculpatory evidence.

Id. at 259.

J. Forced Disclosure: The Hearing Conducted Below.

At the outset of the April 21, 1994, hearing, Judge Spencer observed:

> [T]he primary problem that I am concerned about and that I am going to look at closely is the notice that was given, the opportunity for cross-examination regarding the Sorrell murder issues. . . . If the prosecution had exculpatory information that went in another direction and was not turned over, that impacts on any due process violation that would flow from the insufficient notice.

April 21, 1994 Hearing at 3. The Commonwealth promised that "[o]ur evidence that we prepared tomorrow is primarily focused on establishing that Mr. Gray did in fact commit the Sorrell murders, and therefore, Mr. Tucker's testimony was reliable and it was true." *Id.* at 6.[18]

1. Trial Counsel: "Hit on the side of the head"

Lead trial counsel James Moore testified that, at the time of Petitioner's trial, he was a defense attorney with a "country doctor practice of law" in Suffolk, Virginia. Because he had not handled a capital trial, Moore requested that co-counsel be appointed. *Id.* at 21. The trial court appointed Carl Eason, who had never before handled a murder trial. They filed a motion for discovery because they were "looking for assistance" – "we had no investigator so we were looking for anything we could to give us assistance." *Id.* at 30; *see id.* at 27 (we "went down a checklist of what we needed to do in order to try to get on a level playing field with the Suffolk Police Department . . . since there were just two of us, with no investigator").

Moore recounted how Ferguson's breach of promise affected the defense:

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[18] The Commonwealth subsequently failed to offer any credible evidence connecting Petitioner to the Sorrell crime.

> [T]here were two of us without an investigator, and we were engaged in the active defense of the guilt trial, the guilt phase of the trial.
>
> . . . .
>
> I'm exhausted physically and mentally after one day of active trial work. So to go for 5 consecutive days was similar to running a marathon to me.
>
> . . . .
>
> Well, we had found out, and I don't know how we had found it out, maybe Phil Ferguson told me Thursday evening, that he intended to introduce not only what he [had] told me he was going to introduce on Monday morning when he said he was going to introduce statements made by Gray, but he was also going to put in color photographs, bring the investigator and Medical Examiner down to, in essence, try the Sorrell murders.
>
> Q. How did you react to that, sir?
>
> A. It blew me completely away. And is blowing me eight-and-a-half, almost nine years later, and it still blows me away. It is unbelievable. It is incredible.
>
> . . . .
>
> *Coleman Gray had not even been arrested* for the thing, *much less gone to a preliminary hearing, which is for a defense counsel in Suffolk the only place you can do any real investigation*. . . .
>
> . . . .
>
> Q. The morning of December 6th, 1985, were you prepared to defend the Sorrell murders?
>
> A. Absolutely not.
>
> Q. Did you advise the Judge of that?
>
> A. I sure did.

J.A. 134-38.[19] Counsel also testified that the prosecutor never provided him with any evidence "that would suggest that Mr. Gray was not involved in the Sorrell murders." J.A. 145.[20]

Moore addressed Judge Spencer: "Your Honor, it is important for this Court to know . . . what happened was, . . . the similarities between the McClelland murder and the Sorrell murder would be obvious to anyone sitting in a jury box." J.A. 140-41. Moore and Eason did not investigate the Sorrell killing after the guilt verdict because they "didn't have an investigator." J.A. 148.[21]

2. The District Court's Findings of Fact.

a. Findings with Respect to Disinformation.

In his Memorandum Opinion granting habeas corpus relief, Judge Spencer made the following findings of fact, *see Amadeo v. Zant*, 486 U.S. 214 (1988); F.R.Civ. P. 52, about the Commonwealth's disinformation regarding the Sorrell murders:

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[19] Eason affirmed Moore's testimony in its entirety, and made the following telling observation regarding the impact of Ferguson's bait and switch:

> I did not feel prepared to deal with it. . . . We had been hit on the side of the head, and literally were not ready to be able to try to defend a second murder conviction – excuse me, second murder charge with the notice and time frame that we had been given.

J.A. 173-74.

[20] In particular, the Commonwealth provided no information about Timothy Sorrell as a suspect.

[21] Moore and Eason both made clear that Petitioner steadfastly denied any involvement in the Sorrell killings, and also denied saying to others that he had killed the Sorrells. J.A. 153, 179.

- Pre-trial, defense counsel "sought the disclosure of *all* exculpatory evidence." J.A. 338 (emphasis added).
- "At the outset of the [trial], Mr. Moore . . . asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced [sic] at the penalty phase if defendant Gray was found guilty . . . . Mr. Ferguson stated he intended to introduce evidence of *statements* Coleman Gray had made about other crimes he had committed," including the Sorrell murders. J.A. 339.
- "The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area." J.A. 341.
- Despite Ferguson's "unequivocal pledge" only to introduce statements, "Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims; and 3) the medical examiner who investigated the cause of death and the nature and extent of the Sorrell's injuries." J.A. 342.
- At the time of his unequivocal pledge, Ferguson had already contacted Slezak, who knew for "perhaps a month or more, that he would be called to testify in the Gray murder trial." J.A. 342 n.4.
- "Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders." J.A. 343.
- "Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of" evidence other than statements. J.A. 350.
- "Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney

planned to violate his direct promise to only introduce certain 'statements'. . . . The consequences of this surprise could not have been more devastating." J.A. 350.

◆ "The prosecutor's tactics prevented Gray's attorneys from preparing. . . . " J.A. 350.

◆ "Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence." J.A. 348.

◆ "[T]he Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed." J.A. 351.

b. Findings with Respect to Timothy Sorrell as the Suspect in the Sorrell Murders.

Judge Spencer made the following findings of fact with respect to Slezak's knowledge of Timothy Sorrell as a suspect in the Sorrell murders:

> Officer Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time.[22] At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall

[22] Slezak considered Timothy Sorrell a suspect from the night Lisa and Shanta Sorrell's bodies were found. When Slezak went to Sorrell's home and told him that the bodies had been identified, Sorrell's mother immediately told her son that he did not have to talk to the police. Slezak described Timothy Sorrell's demeanor in subsequent conversations as "highly suspicious" and "defensive." J.A. 185-86 (Testimony of Slezak at April 21, 1994 Hearing).

> on the evening of the murders,[23] ignored the Nixons [Lisa Sorrell's parents] when they saw him at the Greenbrier Mall,[24] made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation,[25] and had a

[23] Lisa and Shanta disappeared during an outing to the Greenbrier Mall. J.A. 285 (Testimony of Brenda Nixon [Lisa Sorrell's mother] at April 21, 1994 Hearing).

[24] On the evening Lisa and Shanta Sorrell disappeared, Timothy Sorrell telephoned Lisa's mother Brenda Nixon three times to ask if Nixon knew where Lisa was: at 6:30 pm, 7:30 pm, and 10:30 pm. Nixon assumed that the three hour lapse between Timothy Sorrell's second and third phone calls was because Timothy was in his regular night school class. She later learned from police that Timothy Sorrell did not attend school that evening. J.A. 286-87, 291-93 (Testimony of Brenda Nixon at April 21, 1994 Hearing).

[25] Slezak admitted that, ultimately, he did not know where Timothy Sorrell was when the murders were committed. J.A. 334 (Testimony of Slezak at April 21, 1994 Hearing). Slezak knew, however, that Petitioner had an alibi for the time of the murders. Slezak theorized that Petitioner committed the murders during his wife Melinda Gray's dinner break from work. Slezak had evidence that Melinda Gray left work at 4:29 pm on the day of the Sorrell murders and returned at 5:30 pm. J.A. 345 n.5. To determine whether Petitioner could have picked up his wife at work, driven to the Greenbrier Mall, abducted the Sorrells, driven them to the crime scene, murdered Lisa Sorrell, spray painted the Sorrells' car, set the car on fire, and returned Melinda Gray to work, all within that hour, Slezak timed the shortest route between Melinda's job and the mall. At 3:00 pm (rather than during rush hour, when the crime occurred), it took Slezak 23 minutes to drive only the first leg of the route from Melinda's work to the mall. J.A. 328-30, 345.

An investigator appointed by the District Court testified that during rush hour it took him 43 minutes to drive from Melinda's work to the Greenbrier Mall, an additional 25 minutes from the mall to where the Sorrells' bodies were found, and 15 minutes more back to Melinda's work. R. 413-17 (Testimony of Alfred Brown at April 21, 1994 Hearing). "Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated." J.A. 345 n.5.

motive to commit the murders.[26] The police also designated Timothy Sorrell as their sole suspect on the evidence they sent to labs to be analyzed.

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead.[27]

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy.[28]

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[26] In contrast, Slezak had no such indications that Petitioner was involved in the Sorrell murders. In fact, even after Slezak lied to Petitioner that fingerprint samples Petitioner had voluntarily provided for comparison in the Sorrell case matched prints from the Sorrell crime scene, Petitioner steadfastly denied any involvement in the murders. J.A. 230-32 (Testimony of Slezak at April 21, 1994 Hearing).

[27] At the district court hearing, Slezak read a statement from the girlfriend of Timothy Sorrell's friend, in which she recounted how, on the night of the murder, Timothy Sorrell told them that his wife had been shot six times and his daughter was in the trunk of the car as the car burned. J.A. 236-38.

[28] In addition, Slezak testified in district court that he received information from persons who had been at a party at the Sorrell house the day before the murders. These people told Slezak that during the party: a man went into a bedroom with Lisa Sorrell then came out and told Timothy Sorrell that he had just had intercourse with Lisa, and ridiculed Timothy Sorrell (J.A. 215); Timothy Sorrell discussed killing his wife and said that he wanted her killed (J.A. 216); and Timothy Sorrell talked about guns and said that he owned a .32 caliber weapon. J.A. 236-39.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week prior to Lisa's death, a man possessing stolen merchandise came to the Sorrells' [sic] home. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, 'there [i]s no evidence that anybody else did commit this crime except Coleman Gray.' Such an assertion is *patently absurd*.

J.A. 344-45 (citations omitted) (emphasis added).

SUMMARY OF ARGUMENT

The district court found as a fact that the prosecution intentionally misrepresented its intentions regarding presentation of the issue of future dangerousness at Petitioner's capital trial. Despite assuring defense counsel that only inmate statements would be introduced regarding the notorious Sorrell murders, the prosecution intended to ambush the defense with detailed *modus operandi* testimony which Petitioner's trial counsel would be unable meaningfully to meet, explain or rebut. This deceptive conduct violated the hornbook constitutional rule, long established by this Court in a variety of contexts – both civil and criminal – that state action which affirmatively misleads a party regarding determinative trial issues violates the Due Process Clause of the Fourteenth Amendment.

Moreover, the prosecutor exploited this ruse by presenting misleading, apparently incriminating evidence while withholding known, countervailing, exculpatory evidence. The Commonwealth failed to disclose significant evidence indicating that Timothy Sorrell, not Coleman Gray, murdered Lisa and Shanta Sorrell. The suppressed information demonstrated that Timothy Sorrell had motive and opportunity to kill his wife and child, and provided other circumstantial evidence that Timothy Sorrell committed the crime. Thus, after deliberately deceiving defense counsel regarding the scope of the future dangerousness issue, the prosecution exacerbated defense counsel's unpreparedness by concealing information inconsistent with its sentencing theory. This misconduct violated the constitutional mandate of *Brady v. Maryland*.

A decision in Petitioner's favor would not create a new constitutional rule. Precedents at the time Petitioner's conviction became final clearly demonstrate that state action which deliberately misleads a party about the nature of determinative trial issues violates rudimentary notions of due process. Furthermore, even if this case involves a new rule – which it does not – the rule would qualify as a watershed rule of criminal procedure implicit in the concept of ordered liberty, falling within the second exception to non-retroactive application of new rules.

ARGUMENT

I. THE PROSECUTION'S AFFIRMATIVE MISREPRESENTATION REGARDING THE INTENDED SCOPE AND NATURE OF ITS PRESENTATION ON THE FUTURE DANGEROUSNESS SENTENCING ISSUE FLOUTED FUNDAMENTAL REQUIREMENTS OF DUE PROCESS AND THE REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING.

The undisputed evidence before this Court reveals that the prosecution presented disinformation prior to Petitioner's sentencing, disabling defense counsel. On the first day of trial, defense counsel asked the trial court to order the Commonwealth to disclose the evidence that the prosecution

planned to present at sentencing. Prosecutor Ferguson stated, with respect to the Sorrell crime, that he intended only to offer inmate statements of alleged confessions by Petitioner. According to the prosecution, therefore, the Commonwealth staked this aspect of its case in aggravation exclusively on the credibility of prisoner testimony.

In the hours between conviction and sentencing, however, the Commonwealth's Attorney disclosed his true intentions. The prosecutor revealed that he also planned to present the testimony of the chief investigating officer in the Sorrell murders, M.I. Slezak; the testimony of the medical examiner who performed the autopsies on the Sorrells; and crime scene and autopsy photographs. Ferguson thus shifted the issue to be tried beyond simply the credibility of inmate testimony to the question of whether the *modus operandi* of the McClelland and Sorrell killings was so strikingly similar that the same individual must have committed both. By adducing first-hand investigative and medical details and grisly photographs of the circumstances of the Sorrell crime, Ferguson left the defense no option but to try to demonstrate that someone other than Petitioner had committed this purported signature crime – an area of proof that the prosecution's trickery had lulled defense counsel into failing to prepare.

Defense counsel objected to the prosecution's surprise evidence, averring that because of Ferguson's pledge that he would present only a "jailhouse snitch" version of the Sorrell offenses, counsel had refrained from investigating the circumstances, *modus operandi*, and other crucial details of those killings and were wholly unprepared to defend Petitioner against the Commonwealth's *modus operandi* case. Despite these protestations (and despite the prosecutor's prior open court assurances), the trial judge allowed the Commonwealth to proceed. The prosecutor then spread before the jury the physical minutiae and the *modus operandi* of the Sorrell killings in extensive, graphic detail. This evidence formed the

centerpiece of the prosecutor's submission that Coleman Gray, as a repeat killer, posed a future danger.[29]

A. The Due Process Clause of the Fourteenth Amendment forbids a prosecutor from deliberately misleading a capital defendant about the issues to be presented at his capital sentencing hearing so as to deprive him of any meaningful opportunity to rebut or explain the state's evidence in aggravation.

The narrow, central question presented in this case is whether due process permits a prosecutor to misrepresent the nature of the state's intended case in aggravation, with the purpose and effect of denying the defendant the opportunity to prepare and contest the critical issues at a capital sentencing hearing. The answer to that question was plainly established in this Court's case law long before Mr. Gray's trial – indeed, long before the Court's well-known opinion in *In re Gault*, 387 U.S. 1 (1967), recapitulated the components of the

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[29] The Sorrell killings were the determinative aspect of the Commonwealth's evidence in aggravation on the future dangerousness issue. In his argument to the trial court urging the judge to admit the Sorrell evidence – despite his prior contrary pledge – Prosecutor Ferguson said the additional evidence he intended to present was critical because it "goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing." J.A. 26-27. In addition, during closing argument at sentencing, Ferguson repeatedly stressed the facts of the Sorrell crime and maintained that Petitioner had committed "murder after murder" and that the cases involved several "brutal, systematic execution-style crimes." J.A. 53, 52. On direct appeal to the Virginia Supreme Court, the Commonwealth conceded that Tucker's testimony "standing alone, may not have been sufficient to convince the jury that the defendant committed the Sorrell murders." Brief of Appellee at 13-14. The Commonwealth also stressed that the evidence regarding the Sorrell murders was "highly probative of" and "particularly indicative of" Gray's future dangerousness. *Id.* at 14, 60. The Virginia Supreme Court concluded that the evidence indicated that the "Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murders." J.A. 98.

"notice which would be deemed constitutionally adequate in a civil or criminal proceeding," *id.* at 33, namely:

> timely notice, in advance of the hearing, of the specific issues that . . . [a party] must meet

id. at 34,

> so that a reasonable opportunity to prepare will be afforded.

Id. at 33; *see, e.g., Roller v. Holly*, 176 U.S. 398, 409-10 (1900); *Warner v. Godfrey*, 186 U.S. 365, 377 (1902); *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 208 (1911); *United States v. Abilene & S. Ry. Co.*, 264 U.S. 274, 289 (1924); *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 234-35, 238 (1938).

In civil and criminal cases alike, this Court has repeatedly held that " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' " *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Odean*, 234 U.S. 385, 394 (1914)); *see, e.g., Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876); *In re Oliver*, 333 U.S. 257, 273, 278 (1948); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956); *Dunn v. United States*, 442 U.S. 100, 106 (1979). "[T]he right to a hearing embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938); *see also, e.g., Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991) (in a "variety of contexts, [this Court's] cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn"); *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) (dictum) ("[a] party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the [decision maker] relies for decision so that he may rebut it"); *Goldberg v. Kelly*, 397 U.S. at 267-68; *In re Gault*, 387 U.S. at 34 ("one of the purposes of notice is to clarify the issues to be considered"); *id.* at 17 (describing the commonplace requirement of "notice of issues" in civil proceedings); *Cole v. Arkansas*, 333

U.S. 196, 201 (1948) (notice of the specific charge "and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal"); *Fed. Trade Comm'n v. Nat'l Lead Co.*, 352 U.S. 419, 427 (1957).

It is, in short, the demonstrable and unmistakable hornbook law of due process that any litigant in any legal proceeding "must be given such notice of the issues involved in the hearing as will reasonably enable him to prepare his case," Bernard Schwartz, *Administrative Law* 283 (2d ed. 1984); *see, e.g.*, Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280-81 (1975). This Court has been protecting litigants against manipulative evasions of that hornbook rule for more than a century. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 521 (1916); *Smith v. Woolfolk*, 115 U.S. 143, 148-49 (1885). This is hardly surprising; for, if " 'process which is a mere gesture is not due process,' " *Covey*, 351 U.S. at 146 (quoting *Mullane*, 339 U.S. at 314-15), then process which is a deceptive gesture is not even debatably within the bounds of constitutional or prosecutorial propriety.

Therefore, unless a reasonable lawyer could suppose that Mr. Gray, at the sentencing stage of his capital trial, was not entitled to the most basic procedural protections vouchsafed by the federal Constitution to civil and non-capital criminal litigants (and even to administrative litigants for over half a century), Mr. Gray's constitutional rights were palpably – and, as the district court below found, quite deliberately – violated by the prosecutor's ruse. *Could* a reasonable prosecutor have supposed that these protections were uniquely inapplicable to death-sentencing proceedings? Certainly not after *Gardner v. Florida*, 430 U.S. 349 (1977), squarely held to the contrary. For *Gardner* both established that "the [capital] sentencing process . . . must satisfy the requirements of the Due Process Clause," *id.* at 358; *see id.* at 364, 365, and announced specifically that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' " *Simmons v. South Carolina*, 114 S. Ct. 2187, 2192 (quoting *Gardner*, 430

U.S. at 362); *accord Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) ("[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"). *Gardner* involved the use of "secret information," *Lankford*, 500 U.S. at 126, contained in an undisclosed presentence report, which was reviewed only by the trial judge who under Florida law acted as the ultimate sentencer. 430 U.S. at 353-54. However, state action that injects such information into the capital sentencing process violates the fundamental requirement of fair notice of the issues to be tried not because the evidence is secret but because it has the "practical effect of concealing from the [defense] the principal *issue* to be decided at the hearing." *Lankford*, 500 U.S. at 126 (emphasis added).

Simmons and *Skipper v. South Carolina*, 476 U.S. 1 (1986), illustrate additional applications of the bedrock requirement of a fair opportunity to be heard on determinative issues. In both cases, the state presented its capital sentencing evidence in open court but used state evidentiary rules to prevent the defendants from meaningfully responding to the "future dangerousness" issue. In *Skipper*, a state evidentiary rule precluded capital defendants from offering evidence regarding their future adaptability to prison life. The prosecutor exploited this rule by simultaneously arguing to the sentencer that the defendant posed a danger to other inmates if sentenced to life imprisonment (rather than the death penalty) and successfully excluding evidence of the defendant's good behavior in jail. Because the state rule deprived Skipper of an adequate opportunity to address the issue on which the state sought his death, this Court concluded that due process, as embodied in *Gardner*, required resentencing. *Skipper*, 476 U.S. at 5 n.1.

Likewise, *Simmons* involved a trial court decision forbidding capital defendant Simmons to meet the state's claim that he posed a future danger if sentenced to life imprisonment (rather than the death penalty) by developing and introducing accurate information regarding his parole ineligibility. *Simmons*, 114 S. Ct. at 2193. Citing both *Gardner* and *Skipper*, this Court concluded that the procedure violated "elementary due process principles" when the "State raised the specter of

petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole." *Id.* at 2194; *see also id.* at 2198.

Yet another way in which the state may unconstitutionally keep a defendant from identifying the legal issues determinative of his rights, and thus deprive him of a meaningful opportunity to address the issues, is simply by misinforming him. *Lankford* illustrates this Due Process notion. Before trial, the *Lankford* prosecutor disavowed any intention to seek the death penalty. During the sentencing hearing, therefore, defense counsel did not address critical capital sentencing issues – the presence, absence and relevance of mitigating and aggravating circumstances. *Lankford*, 500 U.S. at 115. Nevertheless, the sentencing court imposed the death penalty. Reasoning that "fair notice" of the issue to be tried is "the bedrock of any constitutionally fair procedure," *id.* at 121, this Court held that "inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made." *Id.* at 124.[30]

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[30] Lower federal courts have reached the same conclusion. In *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd on other grounds*, 451 U.S. 454 (1981), the state presented testimony about a capital defendant's future dangerousness, even though defense counsel had not been apprised that the mental health evaluation concerned that critical sentencing issue and the psychiatrist's name was not on the state's witness list. The Fifth Circuit reversed, finding that:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, *Gardner v. Florida*, 430 U.S. at 357, 97 S. Ct. at 1204, and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials,' *id.* at 360, 97 S. Ct. at 1206. Smith's attorneys were manifestly surprised by Dr. Grigson's testimony. . . . The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorneys no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired 'the interest in reliability,' *id.* at 359, 97 S. Ct. 1197 as much as secrecy did in *Gardner*.

Smith, 602 F.2d at 699-701 (footnotes omitted); *accord Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) ("[t]he defect is that defendants – at the punishment phase of their trials – were confronted and surprised by the doctor's testimony" which "inhibited, if not denied" the defendants' "ability to question or challenge the veracity of the very testimony that served as the groundwork for their being condemned to die"); *Blackmon v. Scott*, 22 F.3d 560, 566 (5th Cir.), *cert. denied*, 115 S. Ct. 671 (1994) (based on *Gardner*, remanding for evidentiary hearing on claim that defendant was unfairly surprised by manner in which state introduced evidence regarding unrelated, unadjudicated double homicide at capital sentencing); *Williamson v. Reynolds*, 904 F. Supp. 1529, 1573 (E.D. Okla. 1995) (one day notice of state's intent to use evidence of unadjudicated crimes at capital sentencing left defendant "unable to defend against this highly prejudicial testimony, rendering the trial fundamentally unfair in violation of the Due Process Clause").

In other settings, this Court also has maintained consistently that due process prevents state actors from providing "a false sense of security" that particular issues or conduct will not mature into legal disabilities, only thereafter to saddle the duped party with exactly those disabilities. For example, in disbarment proceedings in *In re Ruffalo*, 390 U.S. 544 (1968), the bar commission added further charges of misconduct after both the attorney and a former employee testified. When they testified, the attorney had no notice that the bar commission would add hiring this employee as a count against him; the original charge involved soliciting clients through the employee. Even though the commission allowed the attorney to respond to the belated charge, this Court found a due process violation because the attorney "may have been lulled 'into a false sense of security' that he could rebut [the original] charges by proof that [the employee] was his investigator rather than a solicitor of clients." *Id.* at 551 n.4 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)).

This Court affirmed the same basic due process principle in *Raley v. Ohio*, 360 U.S. 423 (1959), where witnesses before the Ohio Un-American Activities Commission were convicted of contempt for refusing to answer questions. The Commission promised the witnesses that they could assert a state constitutional privilege against self-incrimination during their testimony. They were not informed that a state statute forbade invocation of the privilege in their circumstances and, thus, their refusal to answer questions was criminal. *Id.* at 425. While acknowledging that the Commission did not intend to deceive the witnesses, the Court nevertheless concluded that the assurances given to them constituted "active misleading," and that due process forbade later retraction of those assurances. *Id.* at 438. "[C]onvicting a citizen for exercising a privilege which the State had clearly told him was available to him" would "sanction the most indefensible sort of entrapment." *Id.*; *see also Johnson v. United States*, 318 U.S. 189, 197 (1943) ("An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . . Elementary fairness requires that an accused should not be misled on that score."); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (due process violated when prosecutor commented on defendant's decision not to talk to police at time of arrest because "assurance that silence will carry no penalty . . . is implicit to any person who receives [*Miranda*] warnings").

Ruffalo, *Raley*, *Bouie* and similar decisions involving *accidental* misleading as to the determinative issues flow from an even older and more fundamental doctrine: that the due process clause does not tolerate state action *intentionally* designed to mislead opposing counsel or the factfinder regarding determinative trial issues. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), for example, this Court stated that "deliberate deception of court and jury by the presentation of testimony known [by the prosecution] to be perjured . . . is inconsistent with rudimentary demands of justice." What made the state action in *Mooney* so offensive was the possibility that the state premised its case on testimony that it knew was false, yet kept

defense counsel from learning it was false and thus demonstrating its unreliability. *Accord Pyle v. Kansas*, 317 U.S. 213 (1942) (deliberate suppression of evidence favorable to the accused and knowing use of perjured testimony violated due process); *Alcorta v. Texas*, 355 U.S. 28 (1957) (due process was violated where prosecutor knowingly elicited false testimony providing sole basis for death-eligibility); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (there "has been no deviation from [the] established principle" that due process "cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"). Similarly, in *Napue v. Illinois*, 360 U.S. 264 (1959), a key prosecution witness testified that he was receiving no consideration from the state in exchange for his testimony when, in fact, both he and the prosecutor knew this was not true. This Court recognized that "implicit in the concept of ordered liberty" is the due process requirement that the state not premise its case on the veracity of a particular witness who testifies falsely, while thwarting the defense's effort to challenge the witness' credibility. 360 U.S. at 269; *see also United States v. Agurs*, 427 U.S. 97, 104 (1976) (the prosecution's knowing use of false testimony involves "a corruption of the truth-seeking function of the trial process").

The due process rule that governs Petitioner's case, therefore, is as clear and straightforward as it is well established: *the state may not employ deception to keep an opposing party from developing its case on an issue that the state has made determinative of the outcome.* The robustness of this rule is illustrated by the many contexts in which the Court has applied it – civil as well as criminal (not to mention capital) – including findings of Due Process violations where the state has prevented meaningful presentation on a determinative issue by withholding notice of that issue or misinforming a party that it was not an issue in the particular case.

B. The prosecutor's disinformation regarding his plans to try the Sorrell murders at Coleman Gray's penalty trial denied Petitioner fair notice and an opportunity to be heard on determinative sentencing issues.

The prosecutor's actions in this case transgressed the bedrock due process ban on state action which prevents a defendant from developing his case on determinative trial issues. Ferguson actively misled defense counsel regarding his sentencing phase intentions and then ambushed them with a detailed – but very misleading – presentation on future dangerousness. These "prosecutor[] tactics" were fueled by an affirmative "decision to withhold this information and to surprise" defense counsel. J.A. 348, 350. Ferguson had pledged not to do exactly what he previously "had arranged" to do. J.A. 342.

The Commonwealth's sole argument in the court below was that the Commonwealth satisfied due process in this case by giving defense counsel the formal right to cross-examine the Commonwealth's witnesses. This Court, however, requires that a defendant have a *meaningful* opportunity to contest issues determinative of the state's case. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (due process entitles defendant to a " 'meaningful opportunity to present a complete defense' ") (citation omitted); *Simmons*, 114 S. Ct. at 2199 (Ginsburg, J., concurring) (capital defendant must have "full and fair opportunity" to rebut state's case in aggravation of punishment). To violate due process, state efforts to obscure determinative issues or otherwise prevent a response need not be total, but only effective – as they were in Petitioner's case. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 317-18 (1974); *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

In Petitioner's case, as in *Gardner*, *Skipper* and *Lankford*, had defense counsel received adequate notice regarding the Commonwealth's intentions, "presumably [they] would have advanced arguments that addressed these circumstances." *Lankford*, 500 U.S. at 122. Had the Commonwealth not deceived defense counsel into believing that the critical sentencing issue was whether a jailhouse informant's convenient

account of Petitioner's alleged confession to a collateral crime was believable, defense counsel would have prepared to meet the real issue: that the details of the Sorrell killings so closely matched the *modus operandi* in the McClelland case that Petitioner was guilty of both crimes. Indeed, in Petitioner's case, far worse than in *Gardner*, *Skipper*, or *Lankford*, defense counsel were "*ambushed*." J.A. 351. From a due process standpoint, the Commonwealth's actions in Petitioner's case were more offensive than in *Gardner*, *Skipper*, or *Lankford*. This case does not involve mere prosecutorial negligence or the application of established, but constitutionally erroneous, state rules of evidence. Rather, these facts reveal intentional misconduct – disinformation. In *Gardner*, the state at least advanced some legitimate interest in keeping the information secret. *See Gardner*, 430 U.S. at 358-60. Here, absolutely no *bona fide* state interest justifies the Commonwealth's conscious subterfuge.

Little did defense counsel know that they had been "sucker punched" into foregoing an investigation into the details of the Sorrell crime – details which, in reality, were not nearly so harmful to Gray as the Commonwealth was able to claim. The Commonwealth's false assurances effectively paralyzed the defense. It is commonplace in defending a criminal prosecution, as in any other litigation situation, that selectivity is the essence of presenting one's case to a judge or jury.[31] Told to expect that at the penalty phase the Commonwealth's case would consist exclusively of evidence that Petitioner allegedly had admitted the Sorrell killings – with the only possible source of the admissions being bought-and-paid-for inmate testimony – defense counsel reasonably judged that

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[31] *See, e.g., Jones v. Barnes*, 463 U.S. 745, 752 (1983) (recognizing that a "discriminating advocate" carefully selects the issues he will present and how he will present them); *Burger v. Kemp*, 483 U.S. 775, 792 (1987) (holding that "an experienced trial lawyer" properly decided not to present certain types of evidence at the sentencing phase "that might be literally fatal"); Anthony Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*, 243 [§277] (5th ed. 1989).

they should attack the Commonwealth's case by attacking the credibility of its witnesses.

No capable lawyer, in light of what the prosecutor promised to (and not to) prove, would have prepared to present independent evidence about the factual circumstances (including gruesome details) and the identity of the perpetrator (which would have brought in additional gruesome details) of the Sorrell killings – the most notorious and inflammatory case in the history of Tidewater, Virginia. However, given the issue that the prosecutor actually presented – the investigating detective's and medical examiner's descriptions of the crimes, complete with *modus operandi* and gruesome photos – it would have been critical for Petitioner's lawyers to contest guilt by, for example, proving that someone else – say, Timothy Sorrell – was the culprit. But after the trap was sprung, it was too late for independent defense preparation on the issue. The prosecutor's bait and switch enabled the Commonwealth to present a misleading case that made Petitioner appear to be the culprit and to escape the rebuttal of that case by contrary evidence which the prosecutor knew existed, but continued to conceal.

There is no alternative: long-cherished principles of Due Process forbid the prosecution from providing disinformation regarding the issues upon which it intends to rely at the sentencing phase of a capital trial, thereby preventing the defense from engaging in timely investigation, preparation, and correction, rebuttal or explanation. Because the Commonwealth's action flouted the "bedrock of any constitutionally fair procedure," *Lankford*, 500 U.S. at 121, the district court properly granted the writ of habeas corpus.

II. THE PROSECUTOR'S WITHHOLDING OF EXCULPATORY EVIDENCE TENDING TO SHOW THAT COLEMAN GRAY DID NOT COMMIT THE SORRELL MURDERS VIOLATED THE RULE OF *BRADY V. MARYLAND*.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression of evidence favorable to an accused

upon request violates due process where the evidence is material either to guilt or punishment. . . . "[32] *See also Kyles v. Whitley*, 115 S. Ct. 1555 (1995). Favorable evidence includes that which is directly exculpatory or items which can be used for impeachment purposes. *See Giglio v. United States*, 405 U.S. 150 (1972) (nondisclosure of evidence affecting witnesses' credibility falls within ambit of *Brady*); *Kyles*, 115 S. Ct. at 1565. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

In *Kyles*, this Court discussed the materiality standard, emphasizing that the adjective "reasonable" in the term "reasonable probability" is important. 115 S. Ct. at 1566. The Court noted: "[T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*[33] Furthermore, it does not matter if the undisclosed evidence was in the hands of the police rather than the prosecution. *Id.* at 1567-68. Rather, *Brady*'s duty to disclose

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[32] In capital cases, therefore, evidence which would be favorable to the accused at the sentencing phase of the trial – e.g., evidence which might arguably be mitigating, evidence which might establish residual doubt or impeach state's witnesses, or any other evidence which might lead a reasonable juror to vote for life imprisonment rather than the death penalty – must be disclosed pursuant to *Brady* and its progeny. *Brady*, 373 U.S. at 87.

[33] The *Kyles* Court stated:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).

Kyles, 115 S. Ct. at 1566.

applies to **all** members of the "prosecution team," including **all** law enforcement officers and law enforcement agencies which were in any way involved in the case. *Id.* at 1567 (prosecution has "the duty to learn of favorable evidence known to others acting on the government's behalf in the case, including the police").[34]

Substantial, undisclosed information regarding the probable guilt of another suspect is clearly exculpatory, and virtually always material. Indeed, *Brady* involved an undisclosed statement by a co-defendant that the co-defendant killed the victim. *Brady*, 373 U.S. at 84. Brady had admitted his involvement in the crime, but adamantly maintained that he was not the killer. *Kyles* also involved undisclosed evidence of another person's guilt. The *Kyles* Court emphasized that the improperly withheld information "could have further underscored the possibility that [another person] was [the] actual killer." *Kyles*, 115 S. Ct. at 1569 n.13; *see also id.* at 1572 (with the withheld information, defense could have "attacked the reliability of the investigation in failing to even consider [another person's] guilt"). In the lower courts, cases are legion finding *Brady* violations where the state failed to disclose significant evidence pointing to other suspects. *See, e.g., Banks v. Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995); *Smith v. Sec'y of New Mexico Dep't of Corrections*, 50 F.3d 801 (10th Cir. 1995); *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert. denied*, 479 U.S. 692 (1986); *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Patton v. State*, 530 So.2d 886 (Ala. Crim. App. 1988); *State v. Johnston*, 529 N.E.2d 898 (Ohio 1988); *State v. Munson*, 886 P.2d 999 (Ok. Crim. App. 1994).

The Commonwealth, in addition to affirmatively misleading defense counsel regarding the scope of its sentencing phase presentation, concealed favorable, material information which would have undermined the issue that the Commonwealth *did*

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[34] *Brady* and its progeny also make clear that the good faith – or bad faith – of the prosecution is irrelevant. *Brady*, 373 U.S. at 87.

present. Timothy Sorrell was initially the primary suspect in the murder of his wife and daughter. Law enforcement listed Timothy Sorrell as the sole suspect on evidence sent to crime labs in the Sorrell case. J.A. 192-95, 344. Indeed, Officer Slezak – a key witness in the Commonwealth's effort to demonstrate that Petitioner had killed the Sorrells – had discussed with the Chesapeake Commonwealth's Attorney seeking an indictment against Timothy Sorrell for the murders. J.A. 200-01, 345.

The discussion was prompted by the following:

- Timothy Sorrell admitted that he was at the mall where the victims were believed abducted on the night of the murders. J.A. 199, 344.
- When his wife's parents saw him at the mall that night, he ignored them. J.A. 199, 344.
- On the night Lisa and Shanta Sorrell disappeared, five days before their bodies were found, Timothy Sorrell told a friend that Lisa and Shanta were dead. J.A. 213-14, 344.
- When Officer Slezak told Timothy Sorrell that his wife and daughter had been found dead, Sorrell's unusual reaction caused Slezak to consider him a suspect immediately. Slezak described Timothy Sorrell's demeanor in subsequent conversations as "suspicious" and "defensive." J.A. 185-86, 344.
- Timothy Sorrell changed his alibi for the time of the murders several times. Slezak ultimately said that he did not know where Timothy Sorrell was at the time of the murders. J.A. 187, 334, 344.
- Timothy Sorrell had several motives to kill his wife: two weeks before the murders, an insurance policy was issued on her life naming him as beneficiary;[35] people at a party at the Sorrells the night before the murders told police that another man had gone into a bedroom with Lisa Sorrell and then ridiculed Timothy Sorrell by telling him that he had just had

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[35] Six days before Petitioner's trial, Lisa Sorrell's parents filed a lawsuit seeking to prevent Timothy Sorrell from collecting the insurance proceeds, on the grounds that he had murdered Lisa Sorrell.

intercourse with his wife; and Lisa Sorrell was apparently unhappy with Timothy Sorrell's alleged involvement in a criminal enterprise. J.A. 188, 215, 344-45. *See also* Statement of the Case, sub-section J.2.b., *supra*.

The prosecution did not disclose any of this evidence which might have led reasonable jurors to believe that Timothy Sorrell, not Coleman Gray, killed Lisa and Shanta Sorrell.[36] Had the Commonwealth disclosed this evidence, defense counsel would have completely discredited the prosecution's assertion that Petitioner committed the Sorrell murders, thereby undermining *all* of Tucker's testimony at both guilt/innocence and sentencing. Without this critical evidence, however, the defense was completely unable to counter what appeared to be a strong circumstantial case that Petitioner was guilty of the notorious, uncharged crime.

III. THE DISTRICT COURT DID NOT CREATE A NEW CONSTITUTIONAL RULE IN DETERMINING THAT THE COMMONWEALTH'S DELIBERATE CONCEALMENT OF ITS INTENTION TO TRY THE SORRELL MURDERS AT COLEMAN GRAY'S PENALTY TRIAL VIOLATED DUE PROCESS.

A. This case does not involve a new rule of criminal procedure.

Teague v. Lane, 489 U.S. 288 (1989), established that a new constitutional rule will not be applied or announced in federal habeas corpus cases unless it falls within one of two exceptions. For *Teague* purposes, a rule is new if " 'the result was not dictated by precedent existing at the time the defendant's conviction became final.' " *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994) (quoting *Teague*, 489 U.S. at 301). The inquiry is whether " 'a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he]

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[36] The prosecutor promised pre-trial fully to comply with *Brady*. R. 73.

seeks was required by the Constitution.' " *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

"Surveying the legal landscape" as it existed in October 1987, when Petitioner's conviction and sentence became final, *see Graham v. Collins*, 506 U.S. 461, 468 (1993), reveals that Petitioner's claim was clearly "dictated by precedent." *Butler v. McKellar*, 494 U.S. 407, 412 (1990). As the discussion of Petitioner's claims at pages 30-37, *supra*, indicates, this case is grounded in due process principles established long before Petitioner's conviction became final in 1987. The constitutional rules forbidding affirmative misleading and intentional misrepresentation regarding determinative trial issues, and requiring that capital defendants have a meaningful opportunity to contest, rebut or explain the state's case in aggravation of punishment, were established decades earlier. Furthermore, *Gardner v. Florida*, 430 U.S. 349, established the applicability of due process rules to capital sentencing proceedings in 1977, ten years before Petitioner's conviction became final. *Skipper v. South Carolina*, 476 U.S. 1, applied *Gardner*'s due process analysis to facts not involving "secret information" in 1986.

Deciding the case in petitioner's favor would not extend the reasoning of any of this Court's prior cases and certainly would not overrule or even call into question the validity of any precedent. *See Graham*, *supra*, 506 U.S. at 467 ("it is more difficult to determine whether we announce a new rule when a decision extends the reasoning of our prior cases") (quoting *Saffle v. Parks*). Rather, just as in *Stringer v. Black*, 503 U.S. 222, 237 (1992), the precedents existing at the time petitioner's conviction became final on direct review "yield a well-settled principle:" the state, including in the sentencing phase of a capital trial, may not engage in conduct which affirmatively misleads opposing counsel in such a way so as to deny the defendant a meaningful opportunity to develop his response to, to explain, or to rebut the state's presentation on an issue the state itself has made determinative of the outcome. Although the Virginia Supreme Court held to the contrary, the "short answer" to the state court's decision is that it "made a serious

mistake." *Id.* The new rule principle may "validate[ ] reasonable, good-faith interpretations of existing precedents made by state courts," *Butler*, 494 U.S. at 414, but it does not condone decisions that are both objectively unreasonable and inconsistent in all respects with a long-established and conclusive rule of law.

The Commonwealth cannot point to any decisions that condone the deliberately diversionary misrepresentations in which it engaged at Petitioner's trial; there are no cases from this Court or any other court approving such misconduct. By claiming that its misconduct is immune to correction because it is distinct from that in such cases as *Gardner* and *Skipper*, the Commonwealth seeks a windfall based on the prosecutor's extraordinarily inappropriate behavior in this case. The only difference between the earlier cases, which involved intentional misconduct sanctioned by state law, and this case, which involves deliberate misdeeds initiated by the prosecutor as an ambush tactic, is that earlier cases involved less outrageous and much less self-evidently unconstitutional behavior.

The Fourth Circuit determined that this case involved a new rule because it misunderstood Petitioner's claim. *See Gray v. Thompson*, 58 F.3d at 64 ("the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence") (emphasis in original). Petitioner has never asserted that the Commonwealth bears an affirmative duty to provide advance disclosure of inculpatory evidence.[37] From trial on, Petitioner has relied on the long-established rule that the prosecution may not deprive the defense of an opportunity to address the issues the state itself has made decisive of the outcome, especially when the state does so through trickery and deceit.

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[37] A sampling of Petitioner's arguments in the courts below demonstrates that Petitioner never claimed a constitutional right to advance discovery of the Commonwealth's evidence. *See, e.g.*, Opening Brief for Petitioner-Appellee at 25-30 (filed in circuit court); Petitioner's Memorandum in Response to Motion to Dismiss at 6-7, 13 (filed in district court).

B. This case falls within the exception to non-retroactivity for watershed rules of criminal procedure.

Even if Petitioner sought a new rule, the rule would fall under *Teague*'s second exception for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *see also Teague*, 489 U.S. at 311-12. A due process rule that the state cannot deliberately conceal and affirmatively misrepresent its intentions regarding the nature and scope of determinative trial issues, especially in a capital case, is clearly among the "small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478.

In *Lankford*, this Court recognized "the importance that we attach to fair notice as the bedrock of any constitutionally fair procedure." 500 U.S. at 121. Petitioner invokes a rule mandated by long-recognized principles of fundamental fairness critical to accuracy in capital sentencing determinations. The rule is a necessary component of "the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To condone the Commonwealth's conduct in Petitioner's case would moot the most fundamental promises of due process and encourage prosecutors to run roughshod over the constitutional rights of the accused.

CONCLUSION

For all these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that Gray's prosecutorial misconduct claim – which Gray never raised in state court – called for the creation of an impermissible "new rule"?

2. Whether Gray's so-called "Brady" claim is properly before the Court? Even if it were properly before the Court, does the claim fail in view of the lack of evidence adduced by Gray at the evidentiary hearing in the District Court?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in Petitioner's Brief, this case involves Virginia Code § 8.01-654(B)(2), which provides, in pertinent part, that "[n]o writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which Petitioner had knowledge at the time of filing any previous petition."

It also involves Virginia Code § 8.01-654.1, enacted in 1995, which provides as follows:

> No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or (iii) the period for filing a timely petition for certiorari has expired without such a petition being filed.

STATEMENT OF THE CASE

Coleman Wayne Gray was convicted in 1985 in the Circuit Court for the City of Suffolk, Virginia, of the capital murder of Richard McClelland during the course of a robbery while armed with a deadly weapon. For this crime he was sentenced to death. This case arises from the federal habeas corpus review of that sentence.

The evidence at trial showed that, on May 2, 1985, Gray and an accomplice named Melvin Tucker waited in Gray's car at 9:30 p.m. in the parking lot outside a Murphy's Mart store in the City of Portsmouth, Virginia. The manager of the store, Richard McClelland, had fired

Gray's wife on March 8 (C.A.A. 1896)[1], and Gray had told friends he was going to "get" McClelland. Gray had gone to see McClelland about firing his wife, but McClelland had refused to speak with him. Eleven days after Gray's wife was fired, Gray stole a .32 caliber revolver from the home of an acquaintance. (C.A.A. 1885-86). Gray was armed with that gun as he sat outside the store on the night of May 2.

When the store closed, Gray and Tucker saw McClelland leave the store in his automobile. With Gray driving his own car, they followed McClelland and later abducted him at gunpoint, driving him back to the Murphy's Mart. There, they forced him to open the store and they stole gym bags full of money and merchandise belonging to the store. They then drove McClelland to a secluded location where Gray ordered him out of the automobile and made him lie face down on the ground. As McClelland begged Gray not to shoot him, Gray assured him that he would be unharmed, then fired six pistol shots in rapid succession into McClelland's head above and behind his left ear from a distance of three to eighteen inches. Gray told Tucker as they drove away that he had had to kill McClelland because the victim knew him. Returning to the place where they had left McClelland's car, Gray doused the interior of the car with gasoline and set it on fire.

Although both Gray and Tucker initially were charged with capital murder, the Commonwealth soon determined that Gray was the "triggerman." The distinction was crucial because under Virginia law only the triggerman could be convicted of capital murder and sentenced to death. Tucker pled guilty to first degree murder, and testified against Gray at trial. (C.A.A. 505-10).

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[1] Citations to the Appendix filed in the Court of Appeals will be designated as (C.A.A. ___). Citations to the Appendix filed in this Court will be designated as (J.A. ___).

Gray had given a statement to the police wherein he admitted participating in the robbery and murder, but claimed that Tucker had pulled the trigger. (C.A.A. 1833-37). Gray did not testify in the guilt phase of his trial.

A friend of Gray and his wife described at trial how Gray threatened "to get [McClelland], because they had fired his wife," (C.A.A. 1896, 1902), and how Gray had subsequently told her about disposing of the proceeds of the robbery (C.A.A. 1897-98), taking McClelland back to the store to get money from the safes (C.A.A. 1898), and taking McClelland to the murder site where, in her words, Gray said "That's where he did it." (C.A.A. 1899). These facts, as found by the Supreme Court of Virginia, supported the conclusion that Gray, not Tucker, was the triggerman:

> The murder weapon had been stolen by Gray. Gray, not Tucker, was acquainted with McClelland. Because McClelland had fired Gray's wife from her job at Murphy's Mart, Gray had a motive to kill McClelland. Indeed, he told a friend that he was "going to get" McClelland.

(J.A. 95).

Immediately before jury selection began, the defense moved the Court to order the prosecution to disclose the evidence it planned to introduce in the penalty phase if Gray was convicted of capital murder. This motion was based on precatory language from a State Supreme Court opinion that such disclosure was "the preferred practice."[2] Before the court could rule on the motion, the prosecutor voluntarily disclosed that he intended to introduce evidence of statements Gray had made to other people about other crimes he had committed for which he had not been charged or convicted. The defense represented to the court that they had "good reason to believe"

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[2] *See Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), *cert. denied*, 464 U.S. 865 (1983).

that the prosecution would attempt to introduce a statement that Gray had supposedly made to another inmate that he had committed the heinous double murder of Lisa Sorrell and her three-year-old daughter Shanta in a neighboring jurisdiction the previous December. When asked whether he would introduce anything other than statements, the prosecutor replied "To other people, that's correct. Statements made by your client that he did these things." (C.A.A. 1331).

The guilt phase of trial began on a Monday morning and ended on Thursday afternoon with Gray's conviction. The penalty phase began on Friday morning. At the outset of the penalty phase of trial, defense counsel moved the court for a ruling on the scope of evidence to be admitted. He stated that the prosecutor had informed the defense on Monday morning that he would present testimony that Gray had told someone that he had committed the Sorrell murders. Counsel stated that the defense *was prepared for this evidence*, "argumentatively and evidentiary-wise." (C.A.A. 2064). He stated, however, that the prosecutor had informed the defense the previous evening that he also planned to present photographs of the Sorrell murder victims, autopsy reports, and the testimony of Chesapeake Police Detective Michael Slezak describing the scene of the Sorrell murders. Counsel claimed they had not been given sufficient notice of that evidence and were not prepared to rebut it. He objected to the prosecution introducing anything *other than* the testimony of Gray's statements to fellow inmates about the Sorrell murders. *Counsel never asked for a recess or continuance in order to marshall additional rebuttal evidence, but asked only that the factual evidence describing the crime be excluded.* (C.A.A. 2063-68). The same motion was renewed immediately before the evidence came in. (J.A. 24-28). The trial court overruled counsel's objection.

With respect to the penalty phase, the Supreme Court of Virginia found the following facts on direct appeal:

> During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.
>
> Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that the two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.
>
> A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the cause of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

(J.A. 96-97).

Gray's implication (Pet. Br. p. 10, n.7) that the other aggravating evidence was limited to inmate testimony of Gray's other confessions is incorrect. The Commonwealth proved that Gray had a long criminal record and had been on parole from sentences for malicious wounding and attempted robbery when he murdered Richard McClelland. The victim of Gray's 1977 attempted robbery and malicious wounding testified in person. While he, his wife and two small children were bicycling, Gray, who was a perfect stranger, accosted them at gunpoint and

demanded money. When the victim refused to comply, Gray fired several shots at him, wounding him in the arm and foot, and endangering his wife and two small children who were nearby. (J.A. 14-18).

Other witnesses testified that Gray had admitted responsibility for the armed robbery of a restaurant, that he had had to leave California because he had killed a man in that state, and that he had expressed his willingness to kill a former employer for firing him for the use of profanity. Melvin Tucker also testified that Gray had expressed his intention of harming a woman in their neighborhood if she discussed the Murphy's Mart robbery.

Gray called seven "mitigation" witnesses. Gray testified in person in the penalty phase, denying any involvement in the Sorrell murders, and claiming that Tucker had been the triggerman in the McClelland murder.

The State Claim: An "Unreliable" Link

On direct appeal in the Supreme Court of Virginia, Gray never claimed that the Commonwealth had misled him about the issues to be tried in the penalty phase or had withheld exculpatory evidence from him. He complained of short notice of the additional evidence and argued that Tucker's testimony that Gray admitted committing the Sorrell murders was not sufficiently reliable to permit the introduction of the other very damaging factual evidence concerning the nature of the Sorrell murders. (C.A.A. 2742-45). The state Supreme Court rejected this argument:

> Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker. We cannot say Tucker's testimony was incredible as a matter of law.
>
> Moreover, the evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.
>
> Gray's admission and the information about the particulars of the Sorrell murders were relevant evidence of Gray's propensity to commit violent acts in the future. We conclude, therefore, that the trial court did not err in admitting this evidence.

(J.A. 98-99). This Court denied certiorari on October 5, 1987. *Gray v. Virginia*, 484 U.S. 873 (1987).

In July, 1988, Gray filed in the Circuit Court for the City of Suffolk a petition for a writ of habeas corpus alleging 20 claims. Gray twice sought and was granted leave to add more claims. In claim IX, Gray alleged that the Sorrell murders autopsy evidence and the testimony of Detective Slezak should not have been admitted because Tucker's testimony was "inherently unreliable," and that the Commonwealth's intent to introduce this evidence was not disclosed until such a late date that it was impossible for Gray to prepare "for its use." (C.A.A. 2826). He further argued that "in fact no amount of preparation time on the part of defense counsel would have been adequate." (C.A.A. 2827). Nowhere in his state habeas petition or the two sets of amendments did Gray claim the Commonwealth had withheld exculpatory evidence or deliberately misled him about the issues to be tried in the penalty phase. The prayer for relief at the conclusion of his state petition contained only a general prayer for an evidentiary hearing "on his petition." (C.A.A. 2850).

In oral argument on the respondent's motion to dismiss the state habeas petition, Gray's habeas counsel

characterized several of his claims as not requiring additional evidence beyond that already of record:

> We have here two types of claims in my petition, Your Honor, that are there as one – one sort of claim that I would lump most of these together as legal claims. Claims based on precedent in other courts. *These are claims of law for which no evidence is necessary*. And I would certainly submit that the Court can rule on the sufficiency and legality of those claims, which are simply matters of law to be argued before the Court here today.

(J.A. 110, emphasis added). The first of the claims thus characterized pertained to the use of the allegedly perjured testimony of a Commonwealth's witness on an unrelated matter. The second claim thus characterized, however, was the complaint about admission of the Sorrell murders evidence. (J.A. 113-14).

Later in his argument, Gray's state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim with the ineffective assistance of counsel claims which required evidence to establish the claims themselves:

> But those two grounds, [*i.e.*, the allegedly perjured testimony and the Sorrell evidence] Your Honor, I would suggest are legal claims that certainly require those – a petition for – require further evidence not only to establish the fact that they did likely have an effect on the jury. One can never determine the effect on the jury of this evidence because we could not bring the jury in to explain their effect. But we can establish the likelihood of such an effect, and for that reason, Your Honor, I would urge that those claims not be denied.

(J.A. 115-16).

> Finally, Your Honor, there is one group of claims lumped together under ineffective assistance of counsel, which in essence, the essence of it is a legal claim, but it requires evidence to be submitted to the Court.

(C.A.A. 2922).

The Circuit Court subsequently granted respondent's motion to dismiss without an evidentiary hearing. (J.A. 117). When Gray appealed that ruling to the Supreme Court of Virginia, he argued that the Circuit Court had erred in failing to give him an evidentiary hearing on his perjured testimony and ineffective assistance of counsel claims (J.A. 120-22), *but never contended the Circuit Court should have given him an evidentiary hearing on the Sorrell murders claim*. As to that claim, he argued that the Supreme Court should "re-examine" its ruling on direct appeal as it related to the admission of that evidence. (J.A. 122-24). The Supreme Court of Virginia refused Gray's petition for appeal in a final order entered July 11, 1991. In declining to revisit the claim concerning the Sorrell murders evidence, the State high court cited a State case holding that issues decided on direct appeal normally cannot be relitigated on State habeas corpus.[3] (J.A. 126). This Court again denied certiorari review on May 28, 1991. *Gray v. Thompson*, 111 S. Ct. 2250 (1991).

The Federal Claim: Advance Notice Would Have Yielded Rebuttal Evidence

In Gray's federal habeas petition, he calculatedly stated his claim concerning admission of evidence of the Sorrell murders in the penalty phase of his trial in the form of a broad recitation of allegations concerning events at his trial, with only the most general and conclusory suggestions of a legal theory upon which these events might support habeas corpus relief. (C.A.A. 32-35). The District Court initially dismissed the claim without an evidentiary hearing, holding that Gray was not entitled to advance notice of individual items of evidence the Commonwealth planned to introduce, and that any claim

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[3] *See Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970).

the Commonwealth had withheld exculpatory evidence was procedurally barred by Gray's failure to raise it in state court and was unsubstantiated by factual allegations. (C.A.A. 194). On reconsideration, the District Court discerned in Gray's recitation of the events in his penalty trial a "claim" pertaining to the Sorrell murders evidence which the Court found had been properly preserved and required an evidentiary hearing:

> On the morning the trial commenced, the Commonwealth's Attorney told Gray's counsel that he would present "statements" made by Gray to third parties that he committed the murders of a mother and daughter, Lisa and Shanta Sorrell. Immediately after the guilt phase of the trial, Gray's counsel was informed that the Commonwealth would present color photographs of the victims and detailed testimony of the autopsies and circumstances of the murders the next day, during the penalty phase, to prove that Gray had also committed the Sorrell murders.
>
> The Sorrells were murdered in December, 1984, twelve months before Gray was tried and convicted of the murder of Richard McClelland. At the time of Gray's trial, these murders remained unsolved. The only evidence that Gray committed these crimes was the testimony of Melvin Tucker, Gray's co-defendant, that after the McClelland murder, Gray also told him that he had killed the Sorrells.
>
> The next day, during the penalty phase, Tucker was permitted to recount Gray's alleged confession to the Sorrell murders for the jury. With nothing more than this to link Gray to the Crimes, the Court, as noted above, then permitted the prosecution to put before the jury every graphic detail of the Sorrell murders, even though Gray had never been charged or convicted of such crimes.

(C.A.A. 251-52).

The District Court subsequently issued an order and memorandum opinion stating that the evidentiary hearing was to address the issue of "whether the evidence presented in regard to the Sorrell murders was in fact reliable." (C.A.A. 260). At the outset of the evidentiary hearing, however, the District Court announced that the issue to be decided was not confined to the factual reliability of Melvin Tucker's testimony, but would be substantially broader, including "the notice that was given, the opportunity for cross-examination regarding the Sorrell murders issues," and "if the prosecution had exculpatory information that went in another direction and was not turned over. . . . " (C.A.A. 265). The respondent objected to the hearing because Gray had not proffered in state court the evidence in support of the claim, and it was thus defaulted both factually and legally.

Gray's evidence at the federal hearing showed that when the Commonwealth's Attorney disclosed on Monday morning that in the penalty trial, he would introduce statements that Gray had made to others that he had committed the Sorrell murders, this information did not take defense counsel by surprise. (J.A. 150-51). The previous Friday, counsel had obtained a list of the witnesses the Commonwealth had subpoenaed, and had gone to interview every witness who would talk to them. (J.A. 151). Tucker's name was on the list, and counsel were prevented from interviewing Tucker, not by any action on the part of the Commonwealth, but because Tucker's defense counsel refused to allow them to speak to his client. (J.A. 140, 151). Another name on the Commonwealth's list was that of Keith Godwin, an inmate in a local jail. Counsel attempted to interview Godwin, but he refused to speak to them, because "he hadn't cut a good enough deal with [Commonwealth's Attorney C. Phillips] Ferguson yet to testify against Gray." (J.A. 152). When counsel asked Gray the possible significance of Godwin's listing as a witness, Gray told them that "he had heard" that Godwin had told the Chesapeake police that Gray had admitted to Godwin that Gray had killed the Sorrell

victims. (J.A. 152). Gray denied to counsel that he had made such statements to either Godwin or Tucker. (J.A. 153).

When the Commonwealth's Attorney informed defense counsel on Thursday evening that he would introduce evidence describing the Sorrell murders crime scene and autopsy findings, defense counsel interviewed Detective Slezak on the phone Thursday evening. (J.A. 171).

As the Fourth Circuit correctly found (J.A. 365), the trial record shows that, at the start of the penalty trial, *defense counsel never asked the trial court for additional time to prepare to cross-examine, impeach, or rebut the factual evidence describing the Sorrell murders crime scene and the autopsy evidence of which they had just learned on Thursday evening*. The only remedy that they requested was that the evidence be excluded. (C.A.A. 2063-68; 2119, J.A. 24-28).

At the evidentiary hearing, Gray's trial counsel testified that they had no reason to question any of the evidence presented at trial describing the Sorrell murders crime scene or the findings of the autopsies, and that they had "no argument with the accuracy of it whatsoever." (J.A. 155). The only factual dispute pertained to Melvin Tucker's testimony that Gray had admitted responsibility for the Sorrell murders. (J.A. 154-55).

Gray was not sentenced to death until February 3, 1986, more than two months after the penalty phase of his trial. (J.A. 145-46; C.A.A. 2712). Trial counsel confirmed what Virginia law clearly provides: that at any time between trial and sentencing, and at any time after sentencing up to 21 days after the sentencing order had been entered, the trial court could have vacated the judgment if a motion for a new trial had demonstrated a violation of Gray's constitutional rights. (J.A. 146).

Trial counsel testified that, at the time of Gray's trial, they remembered news broadcasts saying that Timothy Sorrell had been the prime suspect in the Sorrell murders, and then that he had been eliminated as a suspect. (J.A. 139). The respondent further proved that the suspicions

about Timothy Sorrell were public knowledge before and at the time of Gray's trial by introducing numerous newspaper clippings to that effect. (C.A.A. 927-30). Nevertheless, between the penalty trial on December 6, 1985 and the time when Gray's conviction became final on February 24, 1986, defense counsel did not contact Lisa Sorrell's parents, did not ask Slezak why Timothy Sorrell had been a suspect, did not demand such information from the Commonwealth's Attorney or move the trial court to order that they be furnished with such information, and did not investigate the Sorrell murders in any way. (J.A. 147-50, 178-79). This was because defense counsel felt that Melvin Tucker's credibility, and his interest in incriminating Coleman Gray, had been fully addressed during their cross-examination of Tucker in the guilt phase of trial. (J.A. 157).

When the medical examiner essentially repeated in federal court the testimony that he had given at Gray's trial regarding the Sorrell murders, Gray did not even attempt to cross-examine him. (C.A.A. 603). Gray likewise pointed out no inaccuracies in the autopsy reports or the photographs which had been introduced in the penalty phase of his trial. Gray called Detective Slezak as a witness at the evidentiary hearing, but asked him virtually nothing about the facts related in his testimony at Gray's penalty trial describing the crime scene. Instead, Gray concentrated on exploring why Timothy Sorrell initially had been a suspect in the case. (J.A. 315-34).

Detective Slezak and the victims' mother testified at length about the Sorrell murders investigation. On December 5, 1984, Lisa and Shanta Sorrell were last seen leaving the home of Lisa's mother, Brenda Nixon, between 4:30 and 4:45 p.m. to go to Greenbriar Mall, a scant two miles away. From there they planned to go home. Mrs. Nixon expected that her daughter and granddaughter would reach their own home between 5:30 and 5:45, and tried to call her daughter at home at that time. Because no one answered, she called every ten minutes

until 8:00 that evening, becoming increasingly alarmed. (J.A. 285-86).

At about 6:30 p.m., Timothy Sorrell called his mother-in-law to ask if she had heard from Lisa. (J.A. 286). He called again to inquire at 7:30 and again about 10:30. (J.A. 287). Although Mrs. Nixon thought Timothy Sorrell attended evening class at the community college on Wednesday nights, including December 5, Sorrell did not tell her that he was calling from the community college, and she did not ask him. (J.A. 291-92). Police investigation of Timothy's whereabouts revealed that he had been at his mother's house prior to 5:00 (J.A. 323), that he had given a friend a ride to the technical center that was part of Tidewater Community College that evening (J.A. 322-24), and that he had spent the next several hours of the evening at the home of a female friend named Deborah Robertson. (*Id.*) The information that Timothy had been at his mother's house in the late afternoon was provided by Mr. and Mrs. Nixon (J.A. 323); Timothy's alibi at the Robertson house was corroborated by Deborah Robertson. (J.A. 187, 322-23). At the time Ms. Robertson told the police this information, her husband or boyfriend was present, and seemed aware that Timothy had been at the Robertson home on the evening of December 5. The police did not detect any uneasiness between the couple, and concluded that there was no reason to suspect an illicit relationship between Timothy and Deborah Robertson, or to doubt Ms. Robertson's word. (J.A. 322-23). Detective Slezak testified that, although he remembered Timothy telling him that he had been to Chesapeake Technical School to drop off a friend (J.A. 187, 322, 324), he did not recall Timothy ever telling him that he had stayed at evening class throughout the period when the murders apparently were committed. (J.A. 188).

At about 10:30 p.m., roughly 15 minutes after Timothy's last phone call to the Nixons, he came to their home crying. Mrs. Nixon noticed that his pants were wet, but did not think this unusual because it was raining outside.

(J.A. 288). Timothy suggested that they go to Greenbriar Mall to look for Lisa and Shanta. He left in his own car to do so, and Mr. Nixon left immediately thereafter in the Nixon car. (J.A. 288). When Sorrell passed Nixon at Greenbriar Mall while both were looking for Lisa and Shanta, he seemed to ignore Nixon. (J.A. 199). Nixon and Sorrell returned to the Nixon home about 15 minutes later (J.A. 289), and Timothy and Mr. and Mrs. Nixon went to the home of Timothy and Lisa Sorrell, where they all stayed throughout the rest of the night and the next day. (J.A. 289-90).

The bodies of Lisa and Shanta Sorrell were found five days later, on December 10, 1984, in Lisa's four-door burgundy Honda automobile. The car was located approximately five miles from Greenbriar Mall. (J.A. 29, 315). The insides of the windows were covered with soot, obscuring vision into the car. (J.A. 29, 315). Inside the car, a fire had been set to a small pile of paper and debris on the front floorboards. No accelerants had been used in setting the fire. The sun visors melted down from the heat, and the inside of the driver's door was charred. There was soot throughout the interior of the car. (J.A. 315). Lisa Sorrell was sitting in the front passenger seat, and Shanta Sorrell's body was in the trunk. (J.A. 30, 316). Some of Lisa Sorrell's jewelry was still on her person, but there was only a small amount of money in her purse. (J.A. 316-17). The police were unable to determine how much money she had had when she left the Nixon residence, but she was going shopping and intended to have her daughter's picture taken with Santa Claus at Greenbriar Mall. (J.A. 318-19).

Lisa Sorrell had died of six gunshot wounds from a .32 caliber weapon, closely placed above and behind her right ear. (J.A. 44). Shanta Sorrell had died of smoke inhalation. Because soot was found in her airways, the medical examiner opined that the smoke had come from a smoldering fire, not from the exhaust of the automobile. (J.A. 42).

The Chesapeake police began to suspect Timothy Sorreli was involved with the murders on the night the bodies were found. This was because of the reactions of Sorrell and his mother when the police went to tell him of their discovery. Sorrell's mother greeted Detectives Slezak and Harrison at the door of Timothy's home. When the detectives identified themselves, she immediately told Timothy that he did not have to tell them anything. Also, after the detectives had told Timothy about finding the bodies, and asked him if he had any questions, Sorrell asked them questions which they considered odd: he asked them if they had used a helicopter to look for the vehicle, and why the police were so late in notifying him that the bodies had been found. These remarks, plus Sorrell's general demeanor, made the police suspicious. They kept him under surveillance for several days, but learned nothing of value from the surveillance. (J.A. 185-87). As previously stated, the police investigated Timothy Sorrell's whereabouts on December 5, and corroborated what he had told them. (J.A. 187-88, 322-24).

The police were aware that Mr. and Mrs. Nixon had purchased a $50,000 life insurance policy on both Lisa and Timothy. Timothy was the named beneficiary in the event of Lisa's death. (J.A. 188, 284). They investigated other possible motives that Timothy might have had, and learned that his brother had been arrested on a drug charge, but found no connection between that and Timothy or the Sorrell murders. (J.A. 189-90). Because Timothy Sorrell was initially a suspect in the case, his name was listed on requests the police sent to the state lab and reports back from the lab throughout the investigation. (C.A.A. 730-48). This was done as an administrative measure to identify the case with respect to which the lab work was done; it continued even in July 1985, after Timothy Sorrell had been eliminated as a suspect. (J.A. 263).

From checks found on Lisa Sorrell's body, the police learned that she had been selling to people in the community various items of merchandise that corresponded to

merchandise sold in the Naval Supply Center where Timothy Sorrell worked. The police investigated whether Timothy was stealing merchandise from his employer and his wife was selling it, but the Naval authorities never could confirm that such merchandise had been stolen from the Naval Supply Center. (J.A. 263-65). Mrs. Nixon also suspected that Timothy was involved with stolen goods from the Navy Exchange. (J.A. 312-13). She mentioned one occasion when her daughter had called her voicing concern about a man with whom Timothy worked who was at the house "with some things." Mrs. Nixon suggested she have Timothy tell the man to remove them from their house. There was no evidence that Timothy ever knew that Lisa had made this telephone call to her mother. (J.A. 313-14).

The police shared information with the Nixons (J.A. 196-97), and within a month after the murders, the Nixons suspected that Timothy Sorrell knew what had happened to his wife and daughter. However, Mrs. Nixon testified repeatedly that she never believed that Timothy himself had murdered them. (J.A. 298, 303, 308). They began to think back to his actions when the victims disappeared and shortly thereafter. They thought it suspicious that Timothy had been crying when he came to their home at 10:30 that night. (J.A. 309). They also thought his actions before the bodies were found were peculiar, and were suspicious about his statements in a television appeal for information about the missing persons wherein he implored whoever might have them not to hurt them. (J.A. 308-09). Two years later, they filed a lawsuit to prohibit Timothy from collecting the insurance proceeds. At that time, in a thought process which Mrs. Nixon described as "grasping for straws," (J.A. 295), she suspected that Timothy Sorrell's pants had been wet on December 5, not because it was raining outside, but because he had walked through tall wet grass at the crime scene. (J.A. 295). There was never any evidence that there were burrs, grass seeds, or other debris on Sorrell's trousers. She also thought it suspicious that Timothy

seemed not to want to be alone during the time between Lisa's disappearance and when the bodies were found. (J.A. 309).

During the investigation, a $10,000 reward offered by a church and a radio station was advertised in the local newspapers. (J.A. 214, 280). In June 1985, after the reward had been advertised in the newspaper, two individuals named Michelle Davis and Ronald Cole gave the Chesapeake police a report that was superficially incriminating to Timothy Sorrell. (J.A.214-15, 235-36). The police thoroughly investigated this report, however, and determined that it was transparently false.

One of the incidents which Cole and Davis reported concerning Timothy Sorrell had supposedly occurred at a party which they attended at Sorrell's home. They claimed that, during the party, Timothy had discussed plans to kill his wife. (J.A. 215-16). Although the house was in their own neighborhood and they thus should not have had any difficulty in maintaining their bearings in the vicinity, they could not correctly lead the police to Timothy Sorrell's home, selecting instead a home located in an entirely different setting in the subdivision. (J.A. 217-18, 245-46). Although they had reported seeing the car which Lisa Sorrell drove on one occasion shortly before her death, they could not accurately describe her car. (J.A. 216-17). They claimed Timothy said his wife had been shot six times in the forehead, whereas she really had been shot six times in the right rear of her head. (J.A. 257-58). They claimed that they had seen Timothy Sorrell at the Greenbriar Mall on the afternoon Lisa and Shanta Sorrell disappeared, and that he had told them that he had just shot at Lisa's car. The murders were actually committed, and the automobile located, five miles distant from Greenbriar Mall. (J.A. 29, 219-20). Although Cole and Davis described this incident as having occurred in the early afternoon of December 5, 1984 (J.A. 218-19), Lisa Sorrell had last been seen alive by her parents at 4:30 p.m. on that date. (J.A. 219, 278). Another individual whom Cole and Davis had identified as being present at a party

where they claimed Timothy Sorrell had discussed plans to kill his wife said he was in fact present at such a party in December 1984 in that neighborhood, but that Timothy and Lisa Sorrell had not been present. (J.A. 220-21). Moreover, a few days after Cole and Davis originally had made these reports to the Chesapeake police, they came in and admitted to the police that their reports were false. (J.A. 220, 243-45).

Coleman Gray first became a suspect in the Sorrell murders investigation when, in late June 1985, Detective Slezak saw Suffolk Police Department photographs and information from the McClelland investigation showing how Gray had burned the interior of the victim's automobile, and had shot the victim six times in the back of the head with a .32 caliber handgun. (J.A. 205). As the Supreme Court of Virginia found on direct appeal, (J.A. 98), and as defense counsel recognized, (J.A. 141), the crimes were committed in a strikingly similar manner.

Even to the extent the crimes differed, the differences could be attributed to the increasing sophistication of the killer. Slezak testified, and the record reflects, that in the McClelland murder, committed some five months after the Sorrell murders, gasoline was used as an accelerant in burning the interior of the car. (J.A. 223). Also, while in the Sorrell murders, the killer had spray-painted the exterior handles of the car, apparently to cover his fingerprints, no such precautions had been necessary in order to cover fingerprints in the McClelland murder, apparently because the killer wore gloves. (J.A. 223-24). Detective Slezak, with 22 years experience as a police officer, testified that it was not unusual for a serial killer to develop expertise and improve his methods of committing crimes and avoiding detection as he committed subsequent murders. (J.A. 225).

Both the McClelland murder and the Sorrell murders were committed with .32 caliber handguns. (C.A.A. 599, 746, 1545). The Commonwealth had introduced evidence in the guilt phase of Gray's trial that the McClelland murder was committed with a handgun which had been

stolen by Gray in March, 1985 (C.A.A. 1885-86), so there was no contention that both crimes had been committed with the same handgun. Nevertheless, Slezak testified to various reasons why a serial killer might repeatedly choose to use a .32 caliber handgun if his *modus operandi* were to rob his victims and then shoot them in the head at very close range. (J.A. 325-28).

Also in June of 1985, Detective Slezak obtained from Suffolk Police Detective Bunker a copy of a statement given to Bunker by an inmate named Keith Godwin. (J.A. 226-27). Godwin had been a cellmate of Gray for a brief period of time, and told Bunker about Gray's admissions to him that he had committed both the McClelland murder and the Sorrell murders. (J.A. 227).[4] Godwin did not testify against Gray at trial, because he was unable to negotiate the sort of benefit that he wanted in exchange for his testimony. (J.A. 152).

Because of the obvious, strong similarities which Detective Slezak noticed between the McClelland murder and the Sorrell murders, the statement of Keith Godwin influenced him to investigate Gray's possible connection with the Sorrell murders. (J.A. 226-27). At that point, the police had no hard evidence that Timothy Sorrell was involved in the Sorrell murders. (J.A. 229). Slezak went to visit Gray in jail, falsely told him that they were planning to prosecute Timothy Sorrell for the Sorrell murders, and that, because of the similarities between the Sorrell crimes and the McClelland murder, they needed to be able to prove that Gray was not involved in the Sorrell murders in order successfully to prosecute Timothy Sorrell. This was not true (J.A. 229), but was said in an effort to put Gray at ease and induce him to give the police

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[4] Godwin's entire statement was received in evidence at the federal evidentiary hearing. (C.A.A. 897-905). The respondent produced evidence strongly corroborating that Gray had made the statement to Godwin, although Gray may not have been truthful in implicating his wife in the crimes.

information about the Sorrell murders that might incriminate him. Gray eagerly cooperated in what he thought was an opportunity to steer the police away from any suspicion that he had committed the Sorrell murders. (J.A. 230).

Although the police had obtained no identifiable fingerprints from the Sorrell automobile, Slezak told Gray that they had, and got samples of Gray's fingerprints. Slezak gave these samples to another detective and arranged for him to interrupt Slezak's interview with Gray in 20 or 30 minutes and tell him that the fingerprint technician urgently wanted to speak with Slezak. When the detective did so, Slezak pretended to be irritated with the interruption, apologized to Gray, and left the office for 15 minutes or so. When he came back in, he falsely told Gray that out of 18 partial fingerprints found in the Sorrell automobile, they had matched one of Gray's fingerprints. (J.A. 230). In previous questioning, Slezak had established that there was no innocent way Gray's fingerprints could be in the Sorrell car. (J.A. 231). Gray continued to deny his involvement with the crimes. When Gray left Slezak's office at the end of that interview, Slezak and Gray were the only two people who were aware of the fiction that Slezak had told Gray about matching one of 18 partial fingerprints. (J.A. 231).

Subsequently, Slezak learned from the Chesapeake Commonwealth's Attorney that an inmate named Larabee Farrell had written to the Commonwealth's Attorney saying that he had overheard Gray telling another inmate that Gray had committed the Sorrell murders. When Slezak interviewed Farrell, Farrell told him that Gray had told the other inmate "that the police department had 18 partial fingerprints that were found in the car, and only one of them matched him; that he wasn't worried about it." (J.A. 233). Farrell quoted himself as replying, "You dumb ass, how many do you think they need?" He said that Gray then responded, "I guess I touched the owner's manual when I went through the glove box." (J.A. 233). Slezak had not told Farrell the

fiction he had told Gray about the 18 prints with one matching, and the only other person Farrell could have heard that from was Gray. (J.A. 233).

At that time, at the time of Gray's trial, and at the time of the federal evidentiary hearing, Slezak remained convinced that Gray had committed the Sorrell murders. He testified in the federal hearing that it was possible that Timothy Sorrell had been involved in some way, perhaps hiring Gray to commit the Sorrell murders, but he had no evidence to that effect. Nor did he have any viable leads that could be investigated with a prospect of discovering hard evidence to connect Timothy Sorrell or anyone else with the Sorrell murders. (J.A. 233-34).

Suffolk Commonwealth's Attorney C. Phillips Ferguson testified that, although Melvin Tucker as well as Gray initially may have been charged with capital murder, Tucker was never in danger of being convicted of capital murder or sentenced to death, regardless of whether he testified against Gray. (C.A.A. 508-10). Gray, rather than Tucker, was prosecuted for capital murder because all the evidence showed that Gray was the trigger man. (C.A.A. 505). This evidence was summarized not only by Ferguson's testimony (C.A.A. 506-08), but by the factual findings of the Supreme Court of Virginia on direct appeal. (J.A. 95).

In its final order granting habeas corpus relief, the District Court concluded that "the constitutional defect in Gray's penalty phase hearing" was "that the petitioner was confronted and surprised by the testimony of Officer Slezak and Dr. Presswalla," and that this surprise "violated Gray's right to fair notice and rendered the hearing clearly unreliable." (J.A. 349).

The Fourth Circuit reversed. Citing *Caspari v. Bohlen*, 114 S. Ct. 948 (1994), and *Saffle v. Parks*, 494 U.S. 484 (1990), the Court held that the rule sought by petitioner, "a constitutional entitlement to *adequate advance* notice of *particular* items of evidence" "would be novel even today and certainly was not compelled by existing precedent at the time [Gray's] conviction became final." (J.A. 364,

emphasis in original). The Court of Appeals also concluded that "petitioner's contention rings hollow on its facts" because petitioner did not even purport to challenge the accuracy or reliability of the factual evidence with which he claims he had been surprised, and he demonstrated no meaningful way in which he would have proceeded differently had this evidence been disclosed in advance. (J.A. 369). Judge Hall's concurring opinion noted that he would have held the Sorrell murders claim procedurally barred because Gray had never proffered in state court any of the supporting evidence which he presented in the District Court. (J.A. 374-75).

SUMMARY OF ARGUMENT

I.

Calculating that a moving target will be more difficult for the Respondent to hit, Petitioner now attempts to present to this Court his *third* theory of how the use of the "Sorrell murders" evidence violated his constitutional rights. In the State courts, he contended that the autopsy and crime scene evidence should have been inadmissible as a matter of law because the crime was unadjudicated and Melvin Tucker's testimony was too unreliable to link Gray to the murders. In the lower Federal courts and in his Petition for Certiorari in this Court, he embellished upon that theory by adding a complaint that, had he known in advance that the Sorrell murders crime scene and autopsy evidence would be used, he would have been able to discover and present information tending to show that the Sorrell murders were committed by Timothy Sorrell rather than Gray. Now, in his brief on the merits, Gray contends for the first time that the prosecutor misled him as to the *issues* to be litigated in his penalty trial, leading him to think that the "issue" would be the credibility of inmate testimony, whereas the real "issue" would be evidence of *modus operandi*, or similarity of crimes.

Even if the rules of comity, procedural default, and orderly federal procedure were to be suspended in this case and Gray were allowed continually to move the target in this manner, it would not be difficult to score a bullseye each time. Gray's present theory is absurd, because Gray certainly was no *less* inclined, after the prosecutor's partial disclosure, to prepare a defense concerning the Sorrell murders than if the prosecutor had told him *nothing* about his plans to link Gray to the Sorrell murders. In addition, the prosecutor's notice was, at worst, late, and may have been remedied by a recess or continuance to allow Gray to marshall rebuttal evidence. Gray, however, did not ask for a recess or continuance. The only remedy he sought was exclusion of this evidence, and the Constitution certainly does not require such an inflexible response to late notice.

Gray's argument in the lower Federal courts and in his Certiorari Petition must be rejected because there clearly is no constitutional right to advance notice of individual items of evidence which the prosecution will offer, and because, for all of his hyperbole and distortion, Gray has not produced any admissible, material evidence tending to show that he did not commit the Sorrell murders and would not be a future danger.

Gray's argument in the State courts was unsound because the credibility of Tucker's testimony was a matter within the exclusive province of the jury, and the crime scene and autopsy evidence was relevant to show the similarity of the Sorrell murders to the McClelland murder for which he had been convicted, and to show the nature of the Sorrell murders for the purpose of proving Gray's future dangerousness.

Thus, even if the rules of comity, procedural default, and orderly federal procedure were to be suspended for this case and the Respondent were to be required, in this forum, to answer any argument Petitioner could today imagine, each of his various theories would require the Federal courts impermissibly to announce a new rule of law in habeas corpus review of a State judgment, and

each of his theories would be without merit on first principles.

The rules, of course, should not be suspended. Gray's claim as presented in the lower Federal courts should be ruled procedurally barred because it was not exhausted in State court and would presently be barred there for independent State procedural grounds. His theory presented in his brief on the merits in this Court should be rejected for the same reason, and also because it was neither pressed nor passed upon in the lower Federal courts.

II.

Gray's claim that the prosecution withheld exculpatory evidence concerning the Sorrell murders should be rejected because it is without merit, and because it is procedurally barred. It is without merit because the vast majority of the "information" which Gray and the District Court mistook for exculpatory evidence is, like the polygraph examination report recently reviewed by this Court in *Wood v. Bartholomew*, "not 'evidence' at all." 116 S. Ct. 7, 10 (1995). The few shreds of this "information" which may have been admissible under State law were either immaterial or of equal access to Gray and therefore not constitutionally required to be disclosed by the prosecution.

The exculpatory evidence claim is procedurally barred because, as the District Court found, it was never exhausted in State court and would currently be deemed procedurally barred from State habeas review. In addition, the District Court's denial of relief on this as a free-standing claim was never appealed by Gray to the Fourth Circuit, and thus is not properly before this Court.

ARGUMENT

I. GRAY'S "SORRELL MURDERS" CLAIM WOULD REQUIRE THE ADOPTION OF AN IMPERMISSIBLE NEW RULE, IS WITHOUT MERIT, AND IS PROCEDURALLY BARRED.

A. Gray's Claim Would Require The Adoption Of A New Rule.

Distilled to its essence, the rule advocated by Gray is that the Constitution requires nothing short of the exclusion of evidence when, at a capital sentencing proceeding, the prosecutor first tells the defense he intends to prove the defendant's guilt of another murder by proof A and then later says he is going to use proofs B and C as well. Whether this contention is founded on a theory that the prosecution has a constitutional duty to disclose its proofs in advance, or a theory that such conduct by the prosecutor misleads the defendant as to the issues to be litigated,[5] the rule would be new even today. It thus

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[5] While Gray now claims the prosecutor surprised him with new *modus operandi* evidence linking him to the Sorrell murders, the "claim" on which the District Court heard evidence, which was quoted verbatim from Gray's Federal Habeas Petition, expressly stated that *"The only evidence* that Gray committed [The Sorrell Murders] was the testimony of Melvin Tucker," and that the trial court permitted the crime scene evidence *"with nothing more than this* to link Gray to the crimes. . . . " (R. 251-52, emphasis added). Even in his Petition for Certiorari, Gray stated that the "very essence" of his case was that "the prosecutor's tactics of secrecy and surprise" deprived him of a fair opportunity to challenge the accuracy or materiality of the Sorrell murders evidence. (Cert. Pet. p. 24). While he also complained of "the prosecutor's deceitful tactics," this complaint referred to an allegedly dishonest response to his *Brady* motion. Stated differently, his argument was that he was not "given adequate notice or, at the very least, an honest response to [his] *Brady* motion. . . . " (Cert. Pet. p. 23). His complaint about *modus operandi* evidence, while it has no more

cannot be announced in federal habeas review of a state criminal judgment. *Caspari v. Bohlen*, 114 S. Ct. 948 (1994); *Teague v. Lane*, 489 U.S. 288 (1989).

Gray asks this Court to conceptualize the applicable rule at the broadest possible level, arguing that invalidation of his death sentence is dictated by the principle that due process of law applies in sentencing proceedings, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the principle that a heightened standard of reliability is required in capital sentencing proceedings, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), the principle that a defendant is entitled to fair notice of the charges against him, *In Re Gault*, 387 U.S. 1 (1967), and the principle that a defendant may not be sentenced on the basis of information which he has had no opportunity to deny or explain. *Gardner*, 430 U.S. at 362. His analysis is flawed for at least two reasons.

First, the level of generality at which he seeks to apply the "new rule" doctrine would render it meaningless: it would reduce this Court's "new rule" jurisprudence to a doctrine no more restrictive than simple *stare decisis*. *See Gilmore v. Taylor*, 113 S. Ct. 2112, 2119 (1993); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).[6]

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validity than his previous claim, thus "change[s] the substance of the questions already presented," U.S.S. Ct.R. 24.1(a), and should be rejected for that reason. *See Izumi v. U.S. Phillips Corporation*, 114 S. Ct. 425 (1993); *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Tison v. Arizona*, 481 U.S. 137, 146 n.2 (1987); *American National Bank v. Haroco, Inc.*, 473 U.S. 608 (1985).

[6] This case does not involve the sort of rule which "of necessity requires a case-by-case examination of the evidence," and "can tolerate a number of specific applications without saying that these applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring). Such rules are those designed to provide a scale upon which lower courts are to weigh the evidence. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (standard for determining ineffective assistance of counsel); *Jackson v. Virginia*, 443 U.S. 307

Second, none of the broad pre-existing constitutional principles which Gray invokes would invalidate the death sentence in his case. The truism that due process applies in sentencing proceedings begs the question of what process is due. The requirement of heightened reliability in capital sentencing proceedings is an underpinning of *all* of this Court's capital sentencing case law. *Sawyer*, 497 U.S. at 243. If that were the level of generality at which the "new rule" doctrine should be applied, *no* federal habeas corpus decision with respect to the requirements of capital sentencing proceedings could *ever* be a new rule. *See Sawyer*, 497 U.S. at 243.

Gray's constitutional entitlements to notice of the charges and the opportunity to deny and explain the information upon which his sentence was to be based were honored by the state court in his case. Gray undeniably had notice of the nature of the capital murder with which he was charged, and had notice that the Commonwealth would seek the death penalty on the dual bases of Virginia's "future dangerousness" and "vileness" aggravating factors. These were the *issues* to be litigated in Gray's case.[7] Gray had even more specific notice than

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(1979) (standard for evaluating sufficiency of evidence to support conviction). The sort of rule involved here is one controlling the manner in which proceedings are conducted. A factual distinction in such cases is much more likely to change the force with which an established principle applies, *see Wright*, 505 U.S. at 304 (O'Connor, J. concurring), and the rule generally cannot be separated from the result. *See Teague*, 489 U.S. at 301 (defining a "new rule" in terms of the "*result*").

[7] In complaining that the prosecutor's remarks indicated that their evidence would consist of inmate testimony, whereas their evidence turned out to include proof of a *modus operandi*, Gray is addressing notice of the *type of evidence* to be used rather than notice of the issues to be litigated. This is a claim of a right to know how the Commonwealth will prove its case, *i.e.*, a claim of a constitutional right to discovery. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (no constitutional right to discovery).

that, however. He had notice that the Commonwealth would introduce evidence in the penalty phase indicating that he had committed the Sorrell murders. In addition, Gray had the opportunity to deny or explain this evidence, and he in fact did take the witness stand in person and denied having made the inculpatory statement attributed to him by Tucker. (C.A.A. 2219).

Any putative "rule" which the state court supposedly violated, then, must necessarily be drawn more narrowly than the broad principles upon which Gray relies. Indeed, the District Court stated that the "constitutional defect" Gray had proven was lack of notice of *individual items of evidence*:

> The constitutional defect in Gray's penalty phase hearing – that the petitioner *was confronted and surprised by the testimony of Officer Slezak and Dr. Presswalla* – violated Gray's right to fair notice and rendered the hearing clearly unreliable.

(J.A. 349, emphasis added).

Gray denies that he is advocating a constitutional requirement of advance notice of individual items of evidence, and argues that his rule is simply that, if a prosecutor does give such notice, it cannot be misleadingly incomplete. If the rule were only this, however, and did not include an affirmative duty on the part of the prosecution to disclose its evidence in advance, it would not even apply in Gray's case because, whatever one says of the prosecutor's conduct, it certainly rendered Gray no worse off than if the prosecutor had told him *nothing* in advance about his intentions to link Gray to the Sorrell murders.

Gray faults the prosecutor's piecemeal disclosure of his evidence because Gray supposedly would have prepared a more thorough defense if he had known before trial *all* the evidence that the prosecutor planned to present. The fallacy in this argument is that it assumes a constitutional duty on the part of the prosecutor to disclose his evidence in advance. If Gray concedes that no

such duty exists, then the relevant frame of reference in determining whether Gray was misled in any constitutionally prejudicial sense by the prosecutor's piecemeal disclosure is to compare his plight after the piecemeal disclosure to what it would have been had the prosecutor disclosed *nothing* about his plans to link Gray to the Sorrell murders. Having received the prosecutor's pretrial notice that he would introduce Tucker's testimony, Gray was certainly no *less* likely and no *less* inclined to prepare rebuttal evidence concerning the Sorrell murders than if he had been told *nothing*. *Gray thus must inevitably depend on a putative constitutional duty to disclose in advance individual items of evidence.*

Gray's theory, and the District Court's opinion, relied primarily on the rule announced in *Gardner v. Florida* that a defendant may not constitutionally be sentenced on the basis of information which he has had no opportunity to deny or explain. *Gardner*, however, involved a defendant who was sentenced on the basis of a presentence report which contained information which *was never revealed to the defendant at sentencing or at any time until the case was briefed in this Court*. 430 U.S. at 354, 355, n.5. No such secret evidence was presented to the sentencer in Gray's case; all of the evidence of which he complains was presented in open court and was fully subject to cross-examination, and Gray in fact did testify and deny that he had told Melvin Tucker that he had committed the Sorrell murders. As the Fourth Circuit noted, if Gray had felt that more time was necessary to marshall evidence to rebut Tucker's testimony, he could have asked for a recess or continuance. The record clearly shows, however, that Gray chose not to ask for a recess or continuance. The only remedy he requested was that the evidence be excluded. (C.A.A. 2063-68, J.A. 24-28).

Gray thus seeks to extend the *Gardner* rule to cases where the information upon which sentence is to be based is disclosed in open court during the sentencing proceeding. As both the District Court (J.A. 350) and the Court of Appeals recognized, to apply the *Gardner* rule in

this case "requires the analytical equation of 'secrecy' and 'surprise.' " (J.A. 367). The District Court ignored this Court's "new rule" jurisprudence altogether in making this analytical equation; the Court of Appeals correctly ruled that such an equation was impermissible under *Teague* and its progeny.

The analytical equation of "secrecy" and "surprise" in this context would require the Court to extend the language of the *Gardner* rule beyond its literal meaning: a defendant's constitutional right to "deny or explain" the information upon which his sentence is to be based would be interpreted as including a requirement that he have the information disclosed to him in advance so that he may prepare an entire case of rebuttal. In order to determine whether such an extension is permissible under *Teague*, the Court must ask, not whether *Gardner* reasonably can be interpreted as requiring this result, but whether at the time Gray's case became final, *Gardner* reasonably could be interpreted as *not* requiring as much. *Graham v. Collins*, 506 U.S. 461, 477 (1993). Even today, *Gardner* reasonably can be interpreted as not commanding advance disclosure of individual items of evidence.

The *Gardner* plurality opinion itself undercuts the extravagant gloss placed on it by Gray and the District Court. After concluding that due process applied in the sentencing in criminal cases, the *Gardner* plurality was quick to point out that its conclusion "does not, of course, implicate the entire panoply of criminal trial procedural rights." 430 U.S. at 358, n.9.[8] Gray, however, would read

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[8] While one lower court, in a pre-*Teague* ruling, found that the *Gardner* condemnation of secret evidence was, by extension, applicable against surprise evidence, *see Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), other courts quite reasonably reached a contrary conclusion. *See Profitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983); *United States v. Fatico*, 579 F.2d 707, 711-12, n.10 (2d Cir. 1978).

Gardner as conferring upon a criminal defendant new and greater procedural rights in sentencing than defendants currently enjoy even at the trial on guilt or innocence. As the Court of Appeals correctly observed, even in federal criminal cases, there is no right to advance notice of witness statements or corroborating evidence. (J.A. 366).

This Court's "new rule" decisions repeatedly have held that a constitutional rule that a state may not *prevent* a given occurrence in criminal proceedings does not dictate a conclusion that the state may not constitutionally *limit* or *control* the manner in which the event occurs.[9] Similarly, other decisions of this Court have held that rules requiring that state procedures ensure the presence of various safeguards do not dictate conclusions that the States must adopt specific *means* of providing such assurances.[10]

This Court found it unnecessary in *Estelle v. Smith* to decide the advance notice issue. 451 U.S. 454, 473 n. 17 (1981).

[9] For example, in *Saffle v. Parks*, 494 U.S. 484 (1990), this Court held that the constitutional rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), that, in capital sentencing proceedings, the state may not preclude the jury from considering as mitigation any evidence which the defendant offers for that purpose did not dictate a conclusion that the state could not *limit* or *control* the manner in which the jury considered such evidence by refusing to give a jury instruction permitting the jury to choose a life sentence over a death sentence based on sympathy engendered from the defendant's mitigating evidence. 494 U.S. at 492-93. In *Graham*, this Court followed essentially the same analysis in holding that the *Lockett* rule did not dictate the conclusion that a state may not channel a jury's consideration of a defendant's evidence of his solid upbringing and good character into its resolution of one of the Texas "special issues," relating to future dangerousness. 506 U.S. at 475, 113 S. Ct. at 901-02.

[10] For example, in *Teague* itself, this Court held that constitutional rules guaranteeing that trial juries be fairly selected without the influence of racial bias did not dictate a conclusion that fair selection must be assured by proportional

Under the same logic, *Gardner's* command that States ensure the reliability of sentencing evidence by subjecting it to the adversary process and allowing the defendant to deny or explain it certainly does not dictate that States provide this assurance by the *specific means* of advance disclosure to the defense of the evidence the State intends to use at sentencing so that rebuttal evidence may be marshalled before the hearing, as opposed to requiring the defense to respond with the evidence it has at hand or ask for a recess or continuance to marshall additional evidence.

Indeed, this Court's pre-*Teague* case law supports essentially the same conclusion even as a matter of simple *stare decisis*: a constitutional guarantee of a procedural safeguard does not necessarily *support*, much less *dictate*, the conclusion that the Constitution guarantees a specific measure which would be helpful in effectuating that safeguard.

Most pertinent and cogent are the cases applying the Sixth Amendment rights of confrontation and cross-examination of adverse witnesses at trial, and of compulsory process to obtain defense evidence. Although advance notice of the details of witnesses' testimony and of individual items of prosecution evidence undoubtedly

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representation of races on a petit jury. 489 U.S. at 301. In *Sawyer*, this Court held that the constitutional guarantee of reliability in fact-finding in capital sentencing proceedings established in *Woodson* and *Gardner* did not dictate the conclusion that such reliability must be assured by specific means, in that case by applying the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), prohibiting prosecutors from misleading juries to believe that the responsibility for capital sentencing rested elsewhere. 497 U.S. at 236. In *Gilmore*, this Court held that prior cases guaranteeing a defendant the opportunity to present his defense did not dictate a conclusion that the Constitution requires States to ensure that jury instructions outlining affirmative defenses must be stated with a requisite degree of clarity. 113 S. Ct. at 2118-19.

would be helpful in making cross-examination more effective, this Court clearly has held that the constitutional right does not extend that far. There is no constitutional right to receive copies of the pretrial statements of prosecution witnesses even after their testimony on direct examination, *United States v. Augenblick*, 393 U.S. 348, 356 (1969), and there is no constitutional right to discovery in general. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). This is so even though the right of confrontation and the right to compulsory process for obtaining defense witnesses were deemed by the founding fathers to be so central to our system of ordered liberty that they were spelled out expressly in the Sixth Amendment. If the requirement of advance notice of evidence even at the trial on guilt or innocence does not flow from the rights of confrontation, cross-examination, and compulsory process as a matter of *stare decisis*, then surely advance notice of evidence in a penalty proceeding is not *dictated* by the guarantee of an opportunity to explain or contradict such evidence.[11]

In consideration of all the foregoing case law, it certainly would be eminently reasonable, even today as well as in 1987 when Gray's conviction became final, for a trial court to conclude that neither *Gardner* nor any other of this Court's decisions forbade the introduction of penalty phase evidence simply because it had not been disclosed to the defense in advance of the hearing. Granting relief

[11] Additional examples are easy to cite. The right to the assistance of counsel does not include a constitutional right to specific measures that would be helpful to counsel in representing a defendant's interests. *See Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The constitutional right to assurance of an impartial jury has been held not to guarantee the right to ask "content" questions in voir dire that would be helpful in the selection of such a jury. *Mu'Min v. Virginia*, 500 U.S. 415 (1991). The constitutional obligation of trial courts in voir dire to "cover the subject" of pretrial publicity has been held not to require them to do so in a particular manner. *Id.*, 500 U.S. at 424-25.

on Gray's claim thus would require a federal habeas court impermissibly to apply the *Gardner* rule "in a manner that was not dictated by precedent." *Stringer v. Black*, 503 U.S. 222, 228 (1992).

Even if Gray were in a position to complain that the prosecutor's disclosure was misleadingly incomplete, such a rule would be new even today. The established rule is that alleged prosecutorial misconduct does not amount to a constitutional violation unless it "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). That principle, however, even when combined with Eighth Amendment requirements of reliability in sentencing, does not dictate a conclusion that a specific unfair tactic of the prosecutor which does not itself meet the *Donnelly* standard constitutes an Eighth or Fourteenth Amendment violation. For example, the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that a prosecutor's misleading argument to the jury minimizing their sense of responsibility for the sentencing decision posed an unacceptable risk of arbitrary or capricious sentencing, was a new rule for *Teague* purposes. *Sawyer*, 497 U.S. at 236. It is no accident that Gray fails to cite *Caldwell*: citation of *Caldwell* would lead one to *Sawyer*, and *Sawyer* demonstrates that Gray's rule is "new," as was the rule in *Caldwell*.

In addition, the prosecutor's disclosure of his intention to introduce the factual evidence describing the nature of the Sorrell murders was, at worst, late. Although a customary alternative remedy for late disclosure is a recess or a continuance to enable the surprised party to marshall rebutting evidence, *see Taylor v. Illinois*, 484 U.S. 400, 413 (1988), Gray asked for no such relief. The only remedy he sought is that the evidence be excluded. To hold that the Constitution requires exclusion under these circumstances, without the defendant ever having asked for a recess or continuance in the alternative, would certainly be a new rule. *See Taylor*, 484 U.S. at 414 ("neither necessary nor appropriate" for this Court

"to attempt to draft comprehensive set of standards to guide the exercise of discretion in every possible case" of discovery violation).

Gray also argues that the District Court's new rule falls within the second exception to the *Teague* doctrine, which allows federal courts on habeas review of state criminal judgments to announce " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *quoting Teague*, 489 U.S at 311. This Court has expressed doubt that many such rules have yet to emerge, *Teague*, 489 U.S. at 313, and the rule announced by the District Court in this case certainly is not one of them because it is not among the "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Goeke v. Branch*, 115 S. Ct. 1275, 1278 (1995), *quoting Graham*, 506 U.S. at 478 (internal quotation marks omitted). "[I]t has none of the primacy and centrality," *Saffle*, 494 U.S. at 495, of a rule which would come under the second exception, the classic example of which is the right to counsel adopted in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495, *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 693-94 (1969) (separate opinion of Harlan, J.). As this Court observed in *Sawyer*, "*[a]ll* of [its] Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," 497 U.S. at 243 (emphasis added), yet it cannot all fall within the second exception. Just as *Sawyer* held that *Caldwell* did not come within that exception, so the Court should now hold that petitioner's proposed rule does not.

B. Gray's "Sorrell Murders" Claim Is Without Merit.

It follows from what already has been said that, even apart from consideration of the "new rule" doctrine, Gray's claim is directly contrary to existing precedent,

and thus should not be imposed on the States, absent strong, constitutionally-based policy considerations in its favor. Such policy considerations, however, are all strongly against adoption of Gray's proposed rule.

As the Fourth Circuit observed, if this Court were to adopt Gray's rule, "federal courts would be thrust deep into state criminal proceedings . . . [deciding] precisely the type of question that has traditionally been left to the States." (J.A. 368), *citing Herrera v. Collins*, 113 S. Ct. 853, 864 (1993). Such a decision would impose a dramatic new constitutional mandate for detailed discovery in state criminal cases.[12]

In addition, as the Fourth Circuit correctly held, "Petitioner's contention rings hollow on its facts." 58 F.3d at 66. The only penalty phase evidence the reliability of which Gray questions is the testimony of Melvin Tucker, which *was disclosed* to him in advance. Gray never has even alleged that there were any factual inaccuracies in the evidence with which he claims to have been surprised. For the reasons discussed in Argument II of this

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[12] Indeed, in the instant case, advanced disclosure of the evidence introduced by the prosecution to prove the nature of the Sorrell murders would not have revealed the information which Gray claims proved his innocence of those crimes. That information, not disclosed before trial because it simply was not exculpatory evidence, was not introduced by the prosecution in Gray's trial, and could not have been brought out on cross-examination within the scope of the direct examinations that were conducted. Gray's trial attorneys admitted that they interviewed Slezak by telephone on the evening before the penalty phase (J.A. 149, 171), but did not uncover this information. Essentially, Gray claims a constitutional right to conduct a discovery deposition of Slezak, much as he essentially did when he examined Slezak in the federal evidentiary hearing.

brief, none of the information, singly or in combination, which Gray claims he would have investigated and produced at trial had he had advance notice of all the Commonwealth's aggravation evidence would have presented any reasonable probability of a different outcome at trial. Thus, even with the benefit of hindsight, extended investigation time, use of federal civil discovery rules, and a quarter-million dollars in federal funding for his investigation:[13] "Petitioner has advanced no meaningful way in which he would have proceeded any differently at the penalty phase had he known about the photographs, the autopsy report, and the like, before Thursday evening; indeed, it seems likely that Petitioner's case would have unfolded in much the same fashion that it did." 58 F.3d at 66.

For this reason, even if this Court were to disapprove of the way in which the prosecutor responded to Gray's inquiry concerning the penalty phase evidence, it could not find that the prosecutor's conduct infected the entire proceeding with unfairness under the *Donnelly* due process standard. "[T]he appropriate standard for review is 'the narrow one of due process, and not the broad exercise of supervisory power.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Finally, even without the "Sorrell murders" evidence, the other evidence of Gray's "future dangerousness," especially the testimony of his prior shooting victim, Ronald Whitte, was absolutely overwhelming, and it is hard to imagine how the jury could have reached any other conclusion than to sentence Gray to death. For this

[13] A review of the case file discloses that the District Court granted petitioner's request for attorney's fees and expenses in excess of $240,000.

reason, any arguable error in admission of the "Sorrell murders" evidence had no "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993), and was therefore harmless.

C. The "Sorrell Murders" Claim, As Presented In Federal Court, Is Procedurally Barred.

Gray's present "Sorrell murders" claim, that the prosecutor misled him as to the issues at sentencing, was never argued before in any court. It thus is technically not exhausted, but relief would presently be barred in State court under Virginia Code § 8.01-654(B)(2), and also under newly enacted Virginia Code § 8.01-654.1. It thus should be deemed barred from federal habeas corpus review as well. *Teague*, 489 U.S. at 298-99; *Bassette v. Thompson*, 915 F.2d 932, 936 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991).

Even the version of the "Sorrell murders" claim which Gray presented in the lower federal courts, however, was procedurally barred, as Judge Hall's concurring opinion in the Fourth Circuit correctly pointed out. (J.A. 374-75).

The evidence adduced in District Court showed that the suspicions about Timothy Sorrell in connection with the murders of his wife and daughter were widely publicized *even before Gray's trial* and that *trial counsel* could have investigated and presented these facts in support of a motion for a new trial. A claim based on these facts thus would be barred in state habeas under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and thus is barred in federal habeas

as well. *Teague*, 489 U.S. at 298-99; *Bassette*, 915 F.2d at 936.

The state habeas claim pertaining to the Sorrell murders, moreover, was based only on the record of trial; the supporting evidence upon which Gray relied in federal court never was proffered to the state courts. In oral argument on the respondent's motion to dismiss in the Circuit Court of the City of Suffolk, Gray's state habeas counsel expressly characterized this claim as one of two "claims of law *for which no evidence is necessary*." (J.A. 110, *emphasis added*). The first of the claims thus characterized pertained to the use of the testimony of Jeremiah Smallwood.[14] The second claim thus characterized, however, was "the introduction of the testimony and evidence concerning the Sorrell murders in Chesapeake." (J.A. 114).

Later in his argument, apparently as an afterthought, state habeas counsel suggested that evidence could be taken on this claim to show its effect on the jury, but contrasted this claim from the ineffective assistance of counsel claims which required evidence to establish the claims themselves. (J.A. 115; C.A.A. 2922).

The state habeas court denied Gray's Sorrell claim as having been adjudicated on direct appeal. (J.A. 117). In his petition for appeal of the habeas ruling to the Supreme Court of Virginia, Gray urged the Supreme Court to reexamine its ruling on direct appeal rejecting the claim as a matter of law. He argued the merits of the claim as a matter of law, but *never contended that the circuit court should have taken evidence on the claim*. (J.A. 122-24).

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[14] The District Court denied relief on that claim. (C.A.A. 197).

Thus, in state court, the only evidence Gray ever proffered as material to the Sorrell claim was evidence pertaining to its effect on the jurors. Even the rejection of this proffer, however, was waived on Gray's state habeas appeal when it was not assigned as error. *See Coleman v. Thompson*, 501 U.S. 722 (1991).

Because Gray presented his Sorrell claim in state court as one which required no supporting evidence beyond what appears in the record, the District Court erred in granting relief upon evidence proffered for the first time in federal court. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Anderson v. Harless*, 459 U.S. 4, 7-8 (1982); *see Gray*, (J.A. 374-75) (Hall, J., concurring).

The District Court concluded that the refusal of the State habeas court to hold an evidentiary hearing on Gray's claim constituted "cause" for this default. This ruling was wrong for several reasons. First, Gray *affirmatively told the state court that no additional evidence was needed*. Gray's default is thus even more egregious than the default in *Tamayo-Reyes*. Second, Gray never alleged in his state habeas petition most of the facts relied on in Federal court. State habeas law is similar to federal habeas law – one must *allege* specific facts showing entitlement to relief before he is entitled to an evidentiary hearing. *Compare Bassette v. Thompson*, 915 F.2d at 940-41, with *Penn v. Smyth*, 188 Va. 367, 370-71, 49 S.E.2d 600, 601 (1948). Third, Gray's tentative offer in State circuit court to present evidence "of the effect on the jurors" of the Sorrell evidence is not the same evidence upon which he relied in Federal court, and thus the District Court was wrong to speculate that he might also have presented the evidence heard in Federal court. Fourth, any contention that evidence should have been heard in support of the

claim in State circuit court was waived by Gray's failure to argue this point on appeal to the Supreme Court of Virginia. *See Coleman, supra.*

II. GRAY'S SO-CALLED *BRADY* CLAIM IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE LAW, IS NOT PROPERLY BEFORE THIS COURT, AND IS PROCEDURALLY BARRED.

A. The Claim Has No Merit.

The District Court correctly concluded, in its April 1, 1993 Order, that Gray's claim that the prosecution had withheld exculpatory evidence with respect to the "Sorrell murders," in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), was procedurally barred and without merit. (C.A.A. 194). It then erroneously revisited the substance of this claim in its treatment of his "Sorrell murders" claim. The District Court allowed Gray at the evidentiary hearing to examine the lead detective in the Sorrell murders investigation and require him to explain all the reasons why the police initially had regarded Timothy Sorrell as a suspect in the murder of his wife and daughter. Predictably, the detective related suspicions, hearsay, and raw investigative information, much of which was tentative, challenged, and later discredited. The District Court also allowed Gray to present allegations made by the victims' parents in pleadings in an interpleader action over the proceeds of Lisa Sorrell's life insurance policy. Although Gray was unable to distill from this miasma of rumor, suspicion, and raw speculation any hard, admissible evidence that would tend to show Gray was *not* guilty of the Sorrell murders, the District Court somehow mistook it for exculpatory evidence.

In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995) (*per curiam*), this Court corrected a misapplication of its *Brady* jurisprudence in which the Ninth Circuit had seized upon undisclosed information favorable to the defense which was *inadmissible* under State law, and speculated that, had this information been disclosed, it somehow would have led to the discovery of admissible exculpatory evidence, *even though no such evidence was produced at the federal evidentiary hearing.*

The *Brady* aspect of Gray's case is much like the *Brady* claim in *Wood*. Much of the "information" which the District Court characterized as "suggest[ing] that Mr. Gray was not involved in the Sorrell murders" (J.A. 345) was, like the polygraph results in *Wood*, "not 'evidence' at all." 116 S. Ct. at 10. The balance of it was either immaterial under the standard established in *United States v. Bagley*, 473 U.S. 667 (1985), of equal access to Gray and thus not required to be disclosed under *Brady*,[15] or simply wrongly interpreted by the District Court. Thus, none of this information could justify habeas corpus relief even if Gray's *Brady* claim were not procedurally barred.

Specifically, information that Timothy Sorrell had been the primary suspect (J.A. 344), that he was designated as the suspect on a forensic laboratory report (J.A. 344), or that Lisa Sorrell's parents filed a lawsuit to prohibit Timothy Sorrell from collecting the proceeds of a life

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[15] *See Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994), *cert. denied*, 116 S. Ct. 37 (1995); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). *Accord, May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991); *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 110 S. Ct. 322 (1989); *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988); *United States v. LeRoy*, 687 F.2d 610, 618-19 (2nd Cir. 1982); *United States v. Craig*, 573 F.2d 455, 492 (7th Cir. 1977).

insurance policy and made various hearsay accusations in their pleadings in that case (J.A. 344), were all speculation and hearsay, and clearly would not have been admissible under Virginia law to contradict Tucker. *See, e.g., Weller v. Commonwealth*, 16 Va.App. 886, 890-91, 434 S.E.2d 330, 333 (1993). *See also Cross v. Commonwealth*, 195 Va. 62, 74, 77 S.E.2d 447, 453 (1953).

The life insurance policy on Lisa Sorrell payable to Timothy had been taken out by her parents. (J.A. 284). This circumstance, alone or in combination with the other admissible evidence, certainly would not have presented a reasonable probability that the outcome of the penalty proceeding would have been different. *See Bagley*, 473 U.S. at 682. The same is true of Timothy Sorrell's allegedly "strange" questions to the police when first informed that the victims' bodies had been found (J.A. 344), *see Evans-Smith v. Taylor*, 19 F.3d 899, 908 n. 23 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 298 (1994), and the fact that he supposedly "ignored" Herbert Nixon when he passed him walking in Greenbriar Mall while both were there looking for Lisa and Shanta Sorrell on the night they disappeared.

Other information which the District Court regarded as suggesting Gray's innocence of the Sorrell murders was simply not information required to be revealed under *Brady*. For example, the existence or non-existence of published newspaper articles of the sort that the District Court believed Tucker had referred to in his testimony, *i.e.*, articles published shortly after the McClelland murder in May 1985, but depicting photographs of the

victims of the Sorrell murders in December 1984[16] obviously was not information that was *suppressed* by the prosecution, *see Brady*, 373 U.S. at 87, but was equally available to the defense, and therefore not something which the prosecution was required to disclose. *Stockton*, 41 F.3d at 927; *Wilson*, 901 F.2d at 381. Had they chosen to do so, Gray's counsel could have researched the existence or non-existence of such newspaper articles and brought that to the trial court's attention in support of a motion for new trial.

The District Court also referred to an allegation that Timothy Sorrell had told friends, on the night his wife and child disappeared and before their bodies had been found, that they were dead. (J.A. 344). The District Court's page references to the transcript of the evidentiary hearing merely refer to *an allegation* in the suit papers filed by the victim's parents to prevent Timothy Sorrell from collecting the proceeds of a life insurance policy. (J.A. 195-99). Obviously, allegations made in a civil suit between two extraneous parties would not have been admissible evidence in Gray's capital murder trial.

The evidence adduced at the evidentiary hearing, moreover, indicated that, in all likelihood, this report originated from false information given to the police by Ronald Cole and Michelle Davis, who apparently hoped to collect the advertised $10,000 reward for information leading to the apprehension of the killer of Lisa and Shanta Sorrell. (J.A. 214-21, 279-80; C.A.A. 926) (see pp. 18-19 of this brief). The false information supplied by Cole and Davis was not required to be disclosed under

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[16] The District Court erred when it found that Tucker's trial testimony necessarily referred to a newspaper article published in May after the McClelland murder. (See pp. 47-48 of this brief).

Brady. The prosecution has no duty to make a detailed accounting of its investigation, *United States v. Agurs*, 427 U.S. 97, 109 (1976), *quoting Moore v. Illinois*, 408 U.S. 786, 795 (1972), nor to disclose preliminary, challenged, or speculative information. *Agurs*, 427 U.S. at 109, n. 16.

Many other "findings" by the District Court concerning information which supposedly would have exculpated Gray of the Sorrell murders are clearly erroneous. The District Court clearly erred in finding Melvin Tucker was a man "who had escaped prosecution for capital murder in exchange for his testimony" (J.A. 343), and in implying that the only reason Gray was prosecuted for capital murder rather than Tucker was because Tucker agreed to testify. (J.A. 339, 343). Virginia law permitted only the actual trigger man to be prosecuted for capital murder and executed. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980); Va. Code § 18.2-18. As the Supreme Court of Virginia found on direct appeal,[17] the record was replete with circumstantial evidence corroborating Tucker's testimony that Gray, and not Tucker, was the trigger man. Although federal law required the District Court to defer to these findings of fact, *Cabana v. Bullock*, 474 U.S. 376, 388 n. 5 (1986); *Sumner v. Mata*, 449 U.S. 539, 546-49 (1981); 28 U.S.C. § 2254(d), it ignored them, without explanation.

The District Court also clearly erred in concluding that Timothy Sorrell's statement that he had been at the Greenbriar Mall on the evening of the murders tended to exculpate Gray. (J.A. 344). Other than the admittedly false reports by Cole and Davis, the only evidence of Timothy

[17] See p. 3 of this Brief.

Sorrell's presence at Greenbriar Mall on the night of December 5 was the testimony of the victim's mother that Timothy and the victim's father simultaneously went in separate cars to Greenbriar Mall late on the night of December 5 to search for Lisa and Shanta, who had been missing for several hours at that point. Sorrell and his father-in-law left at about 10:30 and returned about ten minutes later. (J.A. 288-89).

Similarly, the District Court clearly erred in concluding that Timothy Sorrell had "changed his alibi throughout the murder investigation." (J.A. 344). The victim's mother testified that, after Lisa and Shanta left her house about 4:45 p.m. to go to their own home, Timothy Sorrell called the mother at about 6:30 to ask where his wife and daughter were, because they were not at home. He called again about 7:30. At the time of the second call, Mrs. Nixon assumed that Timothy was calling from Chesapeake Technical School, where she understood he normally went to evening classes on Wednesday nights. Timothy, however, did not say where he was calling from and she did not ask. (J.A. 291). She later learned that Timothy had told the police that he had spent the evening at the home of a friend. (J.A. 293). Detective Slezak testified that Timothy had told the police he had been to Chesapeake Technical School on the evening of December 5, and that his cousin was supposed to be there, but did not recall Timothy ever saying that he had stayed at Chesapeake Technical School from 7:30 until 10:00 that night. Sorrell had told the police he spent the bulk of the evening at the home of a female friend, and when the police investigated this alibi, the friend and her husband corroborated Timothy's alibi. (J.A. 187-88).

The District Court also clearly erred in concluding that no such newspaper article as Melvin Tucker referred

to in his trial testimony had been introduced into evidence (J.A. 343), and inferring that the supposed absence of such evidence supported Gray's contention that Tucker's testimony was false. Tucker's testimony is equally susceptible to an interpretation that, while searching through a collection of newspapers for the current one with news about the McClelland crime, Gray came across an old newspaper he had saved with the photograph of Lisa Sorrell in it. (J.A. 22-23). Respondent introduced two newspaper articles which could have been the ones Gray showed Tucker if the latter interpretation is correct. (C.A.A. 878, 879). The District Court, which did not see or hear Tucker's trial testimony firsthand, clearly had no basis for arbitrarily adopting the interpretation most favorable to Gray.

B. The Claim Is Doubly Defaulted.

There are two other equally compelling reasons to reject Gray's *Brady* claim. First, as the District Court had correctly found on April 1, 1993 (C.A.A. 194), Gray's *Brady* claim never was raised at trial, on direct appeal, or in state habeas corpus, and thus would currently be barred from state habeas relief under Va. Code § 8.01-654(B)(2), and barred from federal habeas relief under *Teague*, 489 U.S. at 298-99.[18]

[18] Indeed, the evidence at the federal evidentiary hearing showed that the so-called "exculpatory" evidence, consisting of police suspicions about Timothy Sorrell, was widely publicized well before Gray's death sentence became final in the Circuit Court, and thus could have been investigated and presented as the basis of a *Brady* claim in support of a motion for a new trial and on direct appeal. (J.A. 281-83; 218; C.A.A. 926-30). Nevertheless, trial counsel admitted they did not present these matters in support of a *Brady* claim in a motion for a new trial. (J.A. 145-50, 178-89). The *Brady* claim thus would now be barred under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), for Gray's failure to present it at trial and on direct appeal, and under Virginia Code § 8.01-654(B)(2) for Gray's failure to present it in state habeas corpus. That statute applies not only to facts actually known, but to facts reasonably available to a petitioner at the time he filed a previous petition. *Waye v. Murray*, 884 F.2d 765, 766 (4th Cir.), *cert. denied*, 492 U.S. 936 (1989).

Second, Gray never appealed the District Court's April 1, 1993, rejection of his *Brady* claim as a free-standing basis for habeas relief. While he mentioned his *Brady* theory in a footnote in support of his argument on the Sorrell murders (Opening Brief for Petitioner-Appellee in Fourth Circuit, p. 30, n. 10), such casual treatment does not preserve it as an independent claim. Federal Rule of Appellate Procedure 28(a)(3) requires that an appellant's brief contain an explicit statement of the issues to be presented in the appeal. Gray's statement of the issues presented in his Fourth Circuit brief contained no *Brady* claim regarding the "Sorrell murders" evidence.[19] (Opening Brief for Petitioner-Appellee in Fourth Circuit, pp. 2-3). This claim was neither raised nor addressed in the Court of Appeals, and thus is not properly before this Court. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992); *American National Bank v. Haroco, Inc.*, 473 U.S. 608 (1985).

[19] His Issue III in the Fourth Circuit was an unrelated *Brady* claim pertaining to supposed impeachment material of Commonwealth's witness Jeremiah Smallwood.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted:

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FOR ARGUMENT

(10)

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No. 95-6510

In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J.D. NETHERLAND,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner submits this Reply to the Brief of Respondent to discuss Respondent's concessions by omission, errors of fact and law, and misleading or incomplete characterizations of the record.

I. MATTERS ABOUT WHICH THERE IS NO DISPUTE

The state may not employ deception to keep the opposing party from developing its case on an issue that the state has made determinative of the outcome. Respondent does not contest that this rule of due process applies in the criminal prosecution and capital sentencing context.[1]

The writ of habeas corpus "demands . . . application of basic constitutional doctrines of fairness." *Lonchar v. Thomas*, No. 95-5015, 1996 WL 142558, at *6 (U.S. 1996). To facilitate this application, the Habeas Corpus Rules "afford the district court substantial discretion in the conduct of a case once an answer has been ordered," including the discretion to order "[d]iscovery," and "a degree of discretion in determining whether to hold an evidentiary hearing." *Id.* at *9. The district court judge exercised his discretion in this

---

[1] *Cf. Wood v. Bartholomew*, 116 S. Ct. 7, 10 (1995) (if "intentional misstatement" by prosecutor "we would not hesitate to condemn that misrepresentation in the strongest terms"); *United States v. Bagley*, 473 U.S. 667, 696 (1985) ("[t]he prosecutor . . . must place foremost in his [or her] hierarchy of interests the determination of truth.") (White, J., joined by then Chief Justice Burger, and then Justice (now Chief Justice) Rehnquist, concurring); *id.*, 473 U.S. at 704 n. 6 ("A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process."); *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (the obligation of a prosecutor is "not to convict, but to see that, so far as possible, truth emerges."); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (undoubtedly improper conduct did not deny fair trial when no court had so found, evidence was overwhelming, and prosecutor had not "manipulate[d] . . . the evidence" or "implicate[d] other . . . rights of the accused").

case and ordered limited discovery[2] and an evidentiary hearing. Respondent does not suggest that these district court actions were an abuse of discretion.

The district court judge was concerned with how and why defense counsel were tricked regarding the issues to be tried at sentencing.[3] After a two day evidentiary hearing, the district court found as fact that when Commonwealth's Attorney Ferguson made an "unequivocal pledge" that only statements from Petitioner to inma[illegible] would be introduced, he had already, in fact, "arranged to present" other, *modus operandi*, evidence. J.A. 342. Ferguson "planned to violate his direct promise," he made a "decision to withhold this information and to surprise Mr. Gray's attorneys," and the "prosecutor's tactics prevented" preparation and investigation by defense counsel. J.A. 348, 350. These fact-findings are not seriously disputed by Respondent, as they are clearly supported by the record. *See* Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).[4]

---

[2] *See* December 7, 1992, hearing, at 32-33 ("I . . . agonized over it. And I thought that I had fairly resolved the matter by granting what in my estimation was limited discovery. Because this is a case that at least created some nagging doubt in my mind, and I think it needed to be resolved. . . . [I]t was submitted to my sound discretion and I gave it the best reasoned analysis that I could.")

[3] The district court judge was concerned about the fairness of the Commonwealth telling defense counsel at the beginning of trial that at sentencing " 'we are going to put in some statements that came from Gray' " – "[t]hat's your notice, so to speak" – and "then you come on the day of the penalty phase and you find out . . . [that other issues will be litigated] and you have absolutely no notice or opportunity to deal with that. . . . " April 22, 1994, hearing at 429-30.

[4] Indeed, Respondent *agrees* that a party must have fair notice of the issues to be tried. At the outset of the evidentiary hearing conducted in the district court, counsel for Respondent – sounding like defense counsel during sentencing – sought and was granted extra time to prepare:

> [MR. McLEES] We have prepared a case. . . . And to be told on the morning of the hearing that the issue is something else than what we have understood . . . doesn't give us fair notice. I respectfully object.
>
> THE COURT: Now, Mr. McLees, I will certainly do this. If you feel like you don't have sufficient notice of what the hearing is really about and you need more time, I'll give it to you. It is that simple.

April 21, 1994, hearing at 6-7.

In addition to intentionally misdirecting defense counsel, the Commonwealth hid exculpatory evidence, and the district court found that the prosecutor's contention that there was no exculpatory evidence was "patently absurd." J.A. 345. For example, the district court found that the Commonwealth knew that Timothy Sorrell had motives to kill his wife, he had no alibi for the time of his wife's disappearance, he "changed his alibi throughout the murder investigation,"[5] he "was the primary and only suspect in the case for a substantial period of time," he made "suspicious comments [to police] after he was notified his wife and child had been found,"[6] he told persons that his wife and child were dead before they were found,[7] his wife had been "very angry and unhappy about [Timothy Sorrell's] apparent criminal activities," and officer

[5] Respondent contends that this district court judge fact-finding is erroneous, but there is record evidence to support it. *See* section II. B. 1., *infra*.

[6] For example, when Slezak spoke with Timothy Sorrell after the disappearance of the victims, "his first question was whether or not we had a helicopter up looking for the vehicle." J.A. 185-86.

[7] Slezak had in his files witness statements that, on the night of his wife and child's disappearance, *Timothy Sorrell "began to tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire*." J.A. 237 (emphasis added). Respondent does not contest that this and other similar evidence was known by the Commonwealth when Slezak testified against Petitioner at sentencing. Respondent does disagree about the value of the evidence. *See* Section II. B. 2. b., *infra*.

Slezak went to the Commonwealth's Attorney to discuss seeking an indictment against Timothy Sorrell. J.A. 344-45.

In sum, then, the following is not disputed. The district court was entitled to hold an evidentiary hearing, and that court's fact-findings are, unless clearly erroneous, binding. The prosecution may not intentionally misadvise counsel about what will be a determinative capital sentencing issue, and the prosecution did. This misconduct "clearly and justifiably . . . shocked" defense counsel and "prevented" preparation. J.A. 350. These base due process violations left "no . . . reliability whatsoever" in the capital sentencing decision, and "the Commonwealth has not offered any justification for its unreliable procedure in this case." *Id.* at 351-52.

II. MATTERS ABOUT WHICH RESPONDENT HAS MISCHARACTERIZED THE RECORD AND THE APPLICABLE LAW

A. MISLEADING STATEMENTS AND SIGNIFICANT OMISSIONS REGARDING THE RELEVANT LAW

1. Petitioner's claim has always been that he was surprised by the Commonwealth's violation of its pledge

Respondent contends that Petitioner's constitutional challenge to the prosecution's conduct is a "moving target." *See, e.g.*, Respondent's brief at 23. Any fair reading of the record finds that Petitioner's fundamental complaint throughout this litigation – from the day of his sentencing trial until today – has been the same: the Commonwealth's affirmative misrepresentation regarding its presentation of the Sorrell murders, which was the cornerstone of the prosecution's argument that Gray posed a future danger, deprived Petitioner of a

fair sentencing proceeding.[8] Petitioner has steadfastly maintained that the prosecutor's conduct resulted in unfair surprise which deprived counsel of any meaningful opportunity to rebut the state's presentation on the determinative trial issue.[9]

---

[8] The Respondent has earlier taken the position that these issues had been raised repeatedly. *See* Brief in Support of Motion to Dismiss State Habeas Petition at 20 ("[O]bjection was made [at trial] to the introduction of much of the evidence regarding the Sorrell murders based upon claimed short notice and *insufficient time to prepare*."(emphasis added)); December 7, 1992, hearing, at 14 (Respondent's counsel argues below that "[S]tate habeas counsel . . . raised all kinds of claims about the evidence that we used to prove future dangerousness. He raised all kinds of claims about 'Well, you are accusing him of these Sorrell murders. He has never been indicted for them, never been convicted of them, and that violates due process in all different sorts of ways' that he said in his direct appeal and in his state habeas proceeding."); April 21, 1994, hearing, at 4 (Respondent's counsel argues below that "The issues that Your Honor has identified here today, the question of notice given and the opportunity for cross-examination and whether there was exculpatory information that was not turned over, I think were addressed in previous pleadings, and for various reasons, we have argued that they are procedurally barred and they are meritless and they simply do not establish grounds for federal habeas corpus review.").

Respondent's footnote contention that the Petitioner's "complaint about *modus operandi* evidence . . . 'changes the substance of the questions already presented,' " Respondent's brief at 26-27, n. 5 (citation omitted), is incorrect, and is also refuted by the Respondent's pleadings. It is the *Respondent* who has always contended that *modus operandi* was the purpose for the surprise testimony, *see* Petitioner's brief, at 11-13, Respondent continued to so contend in its Brief in Opposition at 4 (citing portion of Virginia Supreme Court opinion where the Court accepted the *modus operandi* argument from Respondent's direct appeal brief), and Respondent continues to say so now. *See* Respondent's brief at 7, 19, and 20.

[9] For example, it is not fair to say that on direct appeal "Gray never claimed that the Commonwealth had misled him about the issues to be tried in the penalty phase . . . " Respondent's brief at 6. In the direct appeal brief, counsel explained that the Slezak testimony was introduced "[o]ver defense counsel's vigorous objection," an objection that was made because

2. Petitioner does not seek a rule of discovery

Respondent attempts to deflect this Court's attention from prosecutorial misconduct by offering varying formulations of Petitioner's claim, in much the same way as it distracted the court of appeals. The rule on which Petitioner relies is not: "misleadingly incomplete" disclosure of evidence (Respondent's brief at 29); a requirement of "advanced disclosure of the evidence" the state intends to produce (Respondent's brief at 37 n. 12); a requirement that the defense receive pretrial notice of prior statements of witnesses (Respondent's brief at 33-34); a rule preventing prosecutors from changing their factual theories or adding to their evidence (Respondent's brief at 26); or the general rule forbidding prosecutorial misconduct. Respondent's brief at 38.

Respondent crafts these "paraphrases" of Petitioner's claim to bar them, in Respondent's view, by the non-retroactive principles of *Teague v. Lane*, 489 U.S. 288 (1989). However, as consistently stated in Petitioner's opening brief, Mr. Gray's submission is only that the prosecution may not employ deception to keep an opposing party from developing its case on an issue that the state has made determinative of the outcome. *See* Petitioner's Opening Brief at 37.

"Gray's defense counsel were taken by surprise by the introduction of any evidence of the Sorrell crimes other than the testimony from Tucker." Appellant's brief at xvii, 3. Of course, the reason they were "surprised" was that they had been misled "until the conclusion of the 'Guilt Trial' on December 5, 1985." Appellant's brief at 4.

In these habeas corpus proceedings, Petitioner presented his claim by following the requirement of pleading facts which, if true, would entitle him to relief, *see, e.g., Blackledge v. Allison*, 431 U.S. 63, 75 n. 7 (1977); *see also* Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* § 11.6 (2d ed. 1994), and there is no requirement that a petition contain in detail the legal theories warranting relief. Petitioner is free, indeed obligated, to refine his legal arguments, especially before this Court, so long as the substance of his claim remains intact.

3. Petitioner is protected from the prosecution's deliberate deceptions

a. Speaking falsely rather than staying silent hurts

Respondent asserts that "Gray's present theory is absurd, because Gray was certainly no *less* inclined, after the prosecutor's partial disclosure,[10] to prepare a defense concerning the Sorrell murders than if the prosecutor had told him *nothing* about his plans to link Gray to the Sorrell murders." Respondent's brief at 24. This ignores the reality of trial work. Had Gray's request that the prosecution disclose what it intended to present regarding the Sorrell murders been denied, or had the prosecutor not stated that he intended to present only jailhouse "snitch" testimony, then Gray's trial counsel would have known that essentially *anything* was fair game, and they would have adjusted investigation, preparation, and trial strategy accordingly. It cannot credibly be put by Respondent that information provided by the prosecution does not affect the defense.[11]

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[10] The disclosure was partial only in the mind of the prosecutor. His words spoke a complete disclosure.

[11] This Court recognized this basic principle, albeit in a slightly different context, in *United States v. Bagley*, 473 U.S. 667, 682-83 (1985) (emphasis added) (citation omitted):

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. *In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses or trial strategies that it otherwise would have pursued.*
>
> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner.

The prosecutor's actions here directly affected trial strategy. For the only alleged fact the prosecutor said he would introduce (jailhouse snitch statements) was so patently impeachable that forays into the far more

b. Withholding exculpatory evidence hurts

Shortly before the trial in this case, Melvin Tucker agreed to testify against Petitioner at guilt/innocence in return for a sentence less than death. *See* R. 766-67 (plea agreement). While plea negotiations were ongoing, Slezak asked Tucker's lawyer if Tucker could also testify about the Sorrell case. Tucker said yes.[12] If Petitioner could have shown that the police had evidence that another person had confessed to, and had the motive and opportunity to commit, the Sorrell murders, and yet the Commonwealth "prosecuted" Gray instead – again using Tucker – the entire evidentiary picture would have changed.[13] In Virginia, evidence that someone

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prejudicial factual terrain, i.e., the condition of the crime scene, would have been fraught with peril. *No* defense attorney would have done anything that would have carried the remotest possibility of opening the door to photographs of a dead child in the trunk of her dead mother's charred automobile. But if it was possible that the *Commonwealth* would introduce such evidence, preparation to deflect its power would have been considered.

[12] Slezak asked Tucker's defense attorney to ask Tucker what involvement Gray had in the Sorrell case. Defense counsel came back and said "there was an involvement" and that "Mr. Tucker would testify." J.A. 207. "[H]e didn't give me a description [of the involvement]. He told me that he would testify." *Id.*

[13] If evidence existed that made police believe that Timothy Sorrell had committed the crime, that evidence would "[have] 'carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case.' " *Kyles v. Whitley*, 115 S. Ct. 1555, 1572 (1995) (ellipses in original) (citations omitted). Such evidence, in light of the Commonwealth's reliance upon Tucker, would reveal the possibility of fraud, *id.* at 1572, n. 15, that the police " 'set [Petitioner] up,' " *id.* at 1573, expose "the [absence of] good faith of the investigation," *id.* at 1571, and undermine "the reliability of the investigation . . . " *id*, and "the process by which the police gathered evidence and assembled the case . . . " *Id.* at 1573, n. 19.

else committed the crime the defendant is charged with is admissible. *See Weller v. Commonwealth*, 434 S.E.2d 330, 333 (Va. App. 1993) (" 'In Virginia, evidence that a crime was actually committed by someone other than the accused is admissible for the purpose of generating a reasonable doubt of the guilt of the accused.' Charles E. Friend, *The Law of Evidence in Virginia* § 150 (3d ed. 1988)."); Charles E. Friend, *The Law of Evidence in Virginia*, § 18-12 (4th ed. 1993) (statement by other suspect that he or she committed the crime admissible); *Karnes v. Commonwealth*, 99 S.E. 562, 565 (Va. 1919) ("a trend of facts and circumstances tending clearly to point out some other person as the guilty party . . . " admissible).[14]

B. MISLEADING STATEMENTS AND SIGNIFICANT OMISSIONS REGARDING THE RELEVANT FACTS.

1. Counsel requested time to prepare

> *Counsel never asked for a recess or continuance in order to marshall additional rebuttal evidence, but asked only that the factual evidence describing the crime be excluded.*

Respondent's brief at 4 (italics in original); *see also id.*, at 12. This statement ignores the opposite fact-finding by the district court and the letter and spirit of the defense requests.[15]

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[14] In *Karnes* the evidence which the Virginia Supreme Court held should have been admitted to prove the guilt of a third party included "evidence tending to show motive on [the third party's] part . . . and its rejection was prejudicial error." *Karnes v. Commonwealth*, 99 S.E. 562, 565 (Va. 1919). Among the similarities between *Karnes* and this case is the fact that the other suspect in *Karnes* "had been suspected [by the police] of the crime (though he had, after an investigation, been released). . . . " *Id.*, 99 S.E. at 564.

[15] Respondent writes that "the prosecutor's notice was, at worst, late, and may have been remedied by a recess or continuance to allow Gray to marshall rebuttal evidence. Gray, however, did not ask for a recess or

Gray's trial counsel's complaint was that, under the unique circumstances which arose from their detrimental reliance on the Commonwealth's promise, they did not have time to prepare to *rebut* the evidence.[16]

> The district court judge found the following fact:
>
> Despite their [counsels'] plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders.

J.A. 343. Respondent ignores this district court fact-finding regarding a "plea for additional time to prepare," and substitutes what is called a fact-finding from the circuit court: "As the Fourth Circuit correctly found (J.A. 365), the trial record shows that, at the start of the penalty trial, *defense counsel never asked the trial court for additional time to prepare. . . .* " Respondent's brief at 12 (emphasis in Respondent's brief). Circuit courts do not find such facts; however, there was ample evidence in the record to support the district court's finding, and Respondent has not advanced any basis for rejecting the district court's fact-finding. *Amadeo v. Zant*, 486 U.S. 214 (1988) (" [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would

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continuance." Respondent's brief at 24. If this Court upholds the district court's fact-finding that there was a request for more time, it appears that Respondent must concede that reversal is appropriate.

[16] Counsel's entreaties were precisely phrased to allow them to marshall rebuttal evidence. *See* R. 722-23, 725 ("we are not prepared to rebut, put on any rebuttal evidence. . . . We are not prepared to try the Sorrell murder today. . . . We are not prepared for any of this, other than he may have made some incriminating statements."); J.A. 25 ("Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge."); *see also* footnote 4, *supra* (Respondent's counsel's objection to lack of "fair notice" understood as a request for time to prepare).

have weighed the evidence differently.' ") (quoting *Anderson v. City of Bessemer City*, *supra*, 470 U.S. at 573-74).[17]

2. Evidence that was suppressed

Once law enforcement officials had to respond to a subpoena, the following was learned. At the time of Petitioner's trial, the police had evidence that Timothy Sorrell was the beneficiary of a life insurance policy on Lisa. The police had evidence that the night before Lisa Sorrell's disappearance she and Timothy were at a party with several persons who were deeply involved with selling illegal drugs. According to witnesses Cole and Davis, people were taking illegal drugs at the party. Some people at the party, including Timothy Sorrell, had .32 calibre weapons. One male at the party told Timothy Sorrell that he had just had sex with Lisa Sorrell. Timothy Sorrell said that he wanted Lisa killed. There was also evidence that before Lisa Sorrell's death she and/or Timothy Sorrell were engaged in fencing property stolen from Timothy Sorrell's work place. Lisa was upset about this enterprise.

According to police, when Lisa Sorrell disappeared Timothy Sorrell started acting odd, tried to set up an alibi, and made statements and took actions that were deemed suspicious by Slezak, Lisa's mother, and other persons in and out of law enforcement. When Timothy Sorrell first arrived at Lisa's mother's house after the disappearance, his pants legs were soaking wet. Lisa was found in her car which was amidst high grass that would have been dampened from the rain falling at the time of her disappearance.

Cole and Davis told police that late on the night of Lisa's disappearance Timothy Sorrell said that she was dead, she had been shot six times in the forehead, and that their child had been placed in the trunk while the car was set on fire. Police

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[17] Furthermore, counsel was under no obligation to request a continuance. Respondent has not cited a single Virginia case indicating that counsel was obligated to do any more than was done here: timely object to the evidence thus fully preserving the issue for appeal.

could not determine where Timothy Sorrell was on that day between 4:30 and 5:30 p.m., the time Lisa and her daughter disappeared.

Timothy Sorrell became and remained the sole suspect for many months. Slezak went to the Commonwealth's Attorney to discuss indicting Timothy Sorrell. Six days before trial, Lisa Sorrell's parents filed a lawsuit to block payment of the insurance benefits to Timothy Sorrell, claiming that he was the murderer, he was still being investigated, and that he was about to be indicted. Slezak and Lisa's parents were in daily communication about the case.

Respondent cannot deny that the police had this information. Instead, Respondent seeks to discredit the information, and cast it in a non-exculpatory light. Much of Respondent's fact recitation requires correction.[18]

a. Timothy Sorrell had no alibi

According to Respondent's brief, "the police investigated Timothy Sorrell's whereabouts on December 5, and corroborated what he had told them." (Respondent's brief at 16). This ignores that Timothy Sorrell had no alibi for the time of the murders:

> Q. Do you know where Timothy Sorrell was from 4:30 to 5:29 on December 5th, 1985?
>
> A. [Slezak] No.

J.A. 334. Respondent attempts to create the impression that Timothy Sorrell was consistently forthcoming and truthful

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[18] This is not limited to the Sorrell case. Respondent's facts about McClelland begin with "[a]lthough both Gray and Tucker initially were charged with capital murder, the Commonwealth soon determined that Gray was the 'triggerman.' " Respondent's brief at 2. The Commonwealth learned no such thing, and did not learn it soon. What was learned was that Tucker would say that Gray shot McClelland. Tucker did not consummate his deal with the Commonwealth until he gave just that statement on November 20, 1985, ten days before trial. Tucker's plea agreement begins with the statement "[y]our client currently is charged with capital murder." *See* R. 766-67; J.A. 339, n. 3.

about his whereabouts at the time of the Sorrell murders and claims that the district court erred in concluding that Timothy Sorrell changed his alibi. Respondent's brief at 14, 47. The district court judge heard Slezak's testimony, and the record supports the district court's finding. J.A. 187, 344.

b. Timothy Sorrell told people he wanted his wife killed, that they were dead, and how they died

Valerie Davis and Ronald Cole told Slezak 1.) that Timothy Sorrell had said at a party on December 4, 1984, the night before her disappearance, that he wanted Lisa killed and 2.) on December 5, 1984, the night she disappeared, Timothy told how she and the baby had been killed. J.A. 236-46.[19] Respondent does not dispute this,[20] but suggests that these witnesses were motivated by a reward, that they were not reliable, and that they later recanted.

Respondent writes that "[i]n June 1985, after the reward had been advertised in the newspaper, two individuals named Michelle Davis and Ronald Cole gave the Chesapeake police a report that was superficially incriminating to Timothy Sorrell. (J.A. 214-15, 235-36). The police thoroughly investigated this report, however, and determined that it was

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[19] Davis' statement recites that Timothy Sorrell's statement about his wife's and child's death was made "late that night" on December 5, 1984. J.A. 237.

[20] Respondent does refer to Timothy's statements about Lisa being dead, before her body was discovered, as merely "an allegation in the suit papers filed by the victim's parents to prevent Timothy Sorrell from collecting the proceeds of a life insurance policy. (J.A. 195-99). Obviously, allegations made in a civil suit between two extraneous parties would not have been admissible evidence in Gray's capital murder trial." Respondent's brief at 45. These were not just pleadings – Davis told Slezak that she heard Timothy Sorrell "tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire," on December 5, 1984, the day Lisa disappeared and five days before the bodies were found. J.A. 237.

transparently false." Respondent's brief at 18.[21] The implication that a reward attracted these witnesses is misleading – police heard about these witnesses and made them come to the police station.[22] Equally misleading is the statement that "[a]lthough the [party] house was in their own neighborhood and they thus should not have had any difficulty in maintaining their bearings in the vicinity, they could not correctly lead the police to Timothy Sorrell's home, selecting instead a home located in an entirely different setting in the subdivision." Respondent's brief at 18. Cole and Davis gave their statements six months after the party and the murders, and Slezak testified that the house to which they led him "looks the same." J.A. 245-46.[23] According to Slezak, Cole and

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[21] Apparently Respondent believes that so long as the police say that they knew about but did not ultimately use evidence extremely incriminating to one person, that evidence is not exculpatory of another, unrelated person. *Kyles*, *supra*, teaches otherwise. In addition, no one testified that these witness statements were "superficially incriminating" and "transparently false," Respondent's brief at 18, the police obviously did not think so little of them, and these are simply Respondent's self-serving characterizations of police evidence. *See also* Respondent's brief at 45-46 (unsupported assertion that these witnesses' statements were "false" and "admittedly false").

[22] "One of the officers who knew a relative of Michelle Davis told us about them. I asked him to bring them to headquarters. They came in, we were introduced, and we interviewed them at that time." J.A. 214-15 (Slezak's testimony). The reward was publicized one week after the murders, more than six months before Cole and Davis were brought in. J.A. 280. It is not fair to claim that these witnesses provided false information because they "hoped to collect the advertised $10,000 reward for information." Respondent's brief at 45.

[23] It looks the same. Whether the color is the same or not, I don't recall. But the floorplan and the general appearance of the outside of the house is very, very similar. *It may be exactly the same*.

J.A. 245-46 (emphasis added). The confusion about the house's location could be attributed to the fact that Cole and Davis were taking drugs the night of the party (J.A. 246) and Cole was so intoxicated that "[t]he next

Davis later came to him and Cole said in a "[v]ery, very brief" discussion, J.A. 244, that his information was not true. Davis did not specifically repudiate her statement. J.A. 245. Slezak admitted that witnesses in Tidewater often refuse to testify because of fear for their own lives, he asked Cole if he had been threatened, and Cole said no. J.A. 244.

c. Other evidence pointing away from Gray and toward Timothy Sorrell

– Timothy Sorrell was the only named suspect on lab reports.[24]

– Petitioner could not have committed the crime. Notably absent from Respondent's brief is any reference to Mr. Gray's alibi. As was set forth in more detail in Petitioner's opening brief at 25, n. 25, the district court found that it appeared that it was impossible for Mr. Gray to commit the Sorrell murders within the prosecutor's alleged time frame. J.A. 345 n. 5.

– Robbery could not have been the motive for Lisa Sorrell's murder – she was found with her gold jewelry,

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day, Ronald didn't remember what had happened that night and barely remembered what had happened that day, because he had been drinking." J.A. 237. This party was in part corroborated by a witness who Respondent says refutes it. Respondent maintains that "[a]nother individual whom Cole and Davis had identified as being present at a party where they claimed Timothy Sorrell had discussed plans to kill his wife said he was in fact present at such a party in December 1984 in that neighborhood, but that Timothy and Lisa Sorrell had not been present." Respondent's brief at 18-19. Slezak interviewed this individual, whose name he received from Cole, and the individual confirmed that he attended the party, acknowledged that a woman and child were present at the party, and said that someone at the party brandished a .357 pistol. This, in key respects, corroborated the Cole/Davis statements.

[24] The Respondent writes that Timothy Sorrell continued to be the named suspect on the Sorrell murder lab reports throughout the investigation only "as an administrative measure," Respondent's brief at 16, but nobody testified to that. J.A. 195, 263.

money, and a money order in the amount of two hundred and eighty dollars ($280.00).[25]

– In addition to the insurance motive, there was evidence that Timothy Sorrell was engaged in a theft ring with Lisa and that she had tired of it. Slezak testified that police found checks written to Lisa Sorrell from various people in the community. J.A. 262. These people told Slezak that Lisa had sold them cameras, tape-recorders, and similar items, items which could have come from Timothy Sorrell's job at the Navy Supply Center. *Id.* Slezak stated that he had investigated whether Timothy Sorrell and his wife were involved together in a theft ring or theft operation concerning the Naval Supply Center and whether this involvement had something to do with her death. J.A. 264-65. The Commonwealth writes that "[t]he police investigated whether Timothy was stealing merchandise from his employer and his wife was selling it, but the Naval authorities never could confirm that such merchandise had been stolen from the Naval Supply Center." Respondent's brief at 17. They could not confirm it because the employer's "inventory control was not accurate." J.A. 262.

– Respondent has produced no newspaper article in support of Tucker's story, as the district court found. At sentencing, Tucker testified that he and Gray were looking through a current newspaper for "some information on the Murphy Mart." J.A. 22. Tucker was then asked whether "the newspaper that he had, did it have any photograph on it?" J.A. 23. Tucker said that it had a picture of the Sorrell girl. *Id.* Judge Spencer noted below that the Commonwealth had never introduced this newspaper article and picture, and now Respondent

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[25] At the penalty phase of Petitioner's trial, Slezak never mentioned – in describing this "signature crime" – that gold jewelry, money, and a postal money order were found with Lisa. The Respondent stresses that "there was only a small amount of money in her purse. (J.A. 316-17)," and that the "police were unable to determine how much money she had had when she left the Nixon residence," Respondent's brief, p. 15, but the existence of cash, a money order, and jewelry dispels any *modus operandi* connection with McClelland.

argues that a newspaper from several months earlier may have been the one to which Tucker was referring.[26]

3. Trial counsel did not say they knew about Timothy Sorrell

According to Respondent,

> Trial counsel testified that, at the time of Gray's trial, they remembered news broadcasts saying that Timothy Sorrell had been the prime suspect in the Sorrell murders, and then that he had been eliminated as a suspect.

Respondent's brief at 12. The only fair reading of trial counsel Moore's testimony is that he does not know whether he learned about Timothy Sorrell, his suspect status, or his "exoneration" before or after the McClelland trial. J.A. 139. Moreover, co-counsel Eason testified that he did not recall knowing that Timothy Sorrell was a suspect in the crimes, and that he did not follow the case closely even though it was highly publicized. J.A. 178.[27]

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[26] Respondent speculates that Tucker's testimony is equally susceptible to an interpretation that, while searching through a collection of newspapers for the current one with news about the McClelland crime, Gray came across an old newspaper he had saved with the photograph of Lisa Sorrell in it. Respondent's brief at 47-48. While this would be an interesting story, Tucker said nothing about a collection of newspapers and his testimony is not susceptible to this interpretation. He plainly referred to a then-current paper, and it is clear that there were no articles featuring a picture of Lisa Sorrell around the time of the McClelland crime.

[27] Respondent states that "between the penalty trial on December 6, 1985 and the time when Gray's conviction became final on February 24, 1986, defense counsel did not contact Lisa Sorrell's parents, did not ask Slezak why Timothy Sorrell had been a suspect, did not demand such information from the Commonwealth's Attorney or move the trial court to order that they be furnished with such information, and did not investigate the Sorrell murders in any way. This was because defense counsel felt that Melvin Tucker's credibility, and his interest in incriminating Coleman Gray, had been fully addressed during their cross-examination of Tucker in

4. The Commonwealth's other evidence of Gray's guilt – more jailhouse snitches

a. Keith Godwin – wrong story

According to Respondent, there was more (unreliable) jailhouse snitch testimony available at trial that would have tied Gray to the Sorrell crime. An inmate named Keith Godwin is said to have given a statement to Suffolk police in which he said that Gray had confessed to both the McClelland and the Sorrell crimes. This witness did not testify at trial because, according to the Commonwealth, "he was unable to negotiate the sort of benefit that he wanted in exchange for his testimony." Respondent's brief at 20.[28]

According to police documents, Godwin's story was that Gray had said that he, his wife, and Tucker abducted McClelland, Gray carried a pistol, Tucker carried a pistol, and Gray's

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the guilt phase of trial." Respondent's brief at 13 (citations omitted). To the extent this passage suggests that defense counsel somehow withdrew their complaint about the surprise evidence, and that they did so because they were happy with their cross-examination of Tucker, it is misleading. Counsel continued to press the issue in their motion for new trial, and on appeal.

Furthermore, counsel was not *required* to investigate and was not required, as Respondent suggests, to file a motion for new trial, during this time frame. *See* Respondent's brief at 12. Respondent has cited no authority that, having raised the issue repeatedly and forcefully, and having been denied relief, counsel could, or had to, keep raising the issue. Even if there was such a requirement, counsel did not know about Timothy Sorrell, had been promised all *Brady* materials by prosecutor Ferguson, and did not have an investigator. There was no apparent reason, or practical way, for trial counsel to do what Respondent suggests.

[28] Inasmuch as Godwin was not charged, the Commonwealth could have called him as a witness. He could not have refused to testify. He was not called because his statement was inconsistent with Tucker's testimony, and he would have ruined the Commonwealth's case.

Respondent could have offered Godwin's testimony below, but did not, because Godwin was apparently still negotiating. April 21, 1994, hearing at 18-19.

wife Melinda was armed with a knife. J.A. 253. According to Tucker's testimony, Melinda was not there at all. Godwin also gave a story about Gray and his wife abducting Lisa Sorrell. According to Slezak, "[t]he vast majority of the information [in Godwin's statement about the McClelland and Sorrell murders] was available through the news media," and it would be reasonable for inmates to make up stories from press accounts. J.A. 253.[29]

b. Larabee Ferrell – the Commonwealth's impeached witness

Respondent advises us that Larabee Ferrell says he overheard Gray saying that the police had eighteen fingerprints and one matched Gray's in the Sorrell case. According to Slezak, only he and Gray knew this story. Ferrell said that Gray said he was not worried about it because it was only one print, and Ferrell quoted himself as replying, "You dumb-ass, how many do you think they need?" Ferrell said that Gray then responded, "I guess I touched the owner's manual when I went through the glove box." According to Respondent, "Slezak had not told Ferrell the fiction he had told Gray about the 18 prints with one matching, and the only other person Ferrell could have heard that from was Gray." Respondent's brief at 21-22.

What Respondent did not say was that Ferrell is the snitch whose testimony at the guilt phase that he overheard Gray confess to another inmate that he shot McClelland was refuted by the other inmate, Carl Bond, a former deputy sheriff. R. 628. Moreover, at the guilt phase, Ferrell testified that he was housed three cells away from Gray, and had never met him, which eliminates the possibility that he told Gray he was a "dumb-ass." R. 573-74. Finally, Slezak acknowledged that Ferrell could have overheard Gray talking about Slezak's fingerprint ruse, and taken his story from there. J.A. 248.

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[29] Godwin wanted to testify because he faced a long prison sentence without possibility of parole for a string of armed robberies. Slezak stated that he was concerned that Godwin had fabricated his story. J.A. 254.

CONCLUSION

For these reasons, as well as for those set forth in Petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Has a federal constitutional question been "fairly presented" to the state courts, for the purpose if the habeas procedural default and exhaustion rules, when the only arguments made there were recitations of the facts, discussions of state law, and generic references to "due process" and "fair trial"?

2. When a defendant has demanded exclusion of evidence as a sanction for a discovery violation and not requested any lesser sanction, would a rule to the effect that admission of the evidence is constitutional error be a "new rule" under *Teague* v. *Lane*?

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Treatise

J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure (2d ed. 1994) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J. D. NETHERLAND, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state trial court based on arguments never fairly presented to the state courts and, in part, attempting to create new rules not existing at the time of the state decision. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

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1. CJLF has written consent of both parties to file this brief.

SUMMARY OF FACTS AND CASE

On May 2, 1985, Coleman Gray and Melvin Tucker robbed, kidnapped, and murdered Richard McClelland. J. A. 355-356. Tucker testified that Gray was the triggerman. The jury convicted Gray of capital murder. J. A. 357. In the penalty phase, Gray admitted involvement in the crime but still denied being the triggerman. Brief for Petitioner 11.

Prior to guilt phase, the prosecution notified the defense it would accuse Gray in the penalty phase of having murdered Lisa Sorrell and her 3-year-old daughter Shanta. The prosecutor said he would only introduce statements of Gray to other persons as evidence of this.

Three days later, at the conclusion of the guilt phase, the prosecutor said he had additional evidence to introduce. The defense moved to exclude the additional evidence, but the trial court denied that motion, holding the evidence admissible. J. A. 172. In addition to the Sorrell murders, Gray's criminal record included 13 felony convictions, at least nine of which were violent. J. A. 358.

The defense did not move for a continuance. J. A. 365.

The conviction and sentence were affirmed on appeal. J. A. 109. Gray had counsel for state habeas, see J. A. 110, his petition was dismissed, J. A. 118, and the dismissal was affirmed. J. A. 126-127. The federal District Court granted habeas relief on the ground that the Commonwealth had "failed to give fair notice of its intention to prove" that Gray committed the Sorrell murders. J. A. 353. The Fourth Circuit reversed, holding that the District Court had impermissibly created a new rule contrary to *Teague* v. *Lane*. J. A. 367-368.

SUMMARY OF ARGUMENT

In order to coherently apply the rules governing habeas corpus, it is necessary to have a clear definition of what the "claim" is. A claim must be stated in both state and federal court in terms specific enough to identify the relevant precedents and apply them to the facts of the case before the court.

Petitioner claims, and the District Court held, that admission of the evidence of the Sorrell murders beyond that which the prosecutor earlier disclosed he would introduce violated the Constitution. Given that the defense did not move for a continuance upon learning of the additional evidence, such a claim would have to include a contention that either (1) exclusion is the sole constitutionally permissible remedy for such a discovery violation, or (2) the trial court is constitutionally required to order a continuance *sua sponte*.

Neither the above claim nor the *Brady* claim was ever fairly presented to the state courts. The arguments submitted to state courts were recitations of the facts, discussions of state law, and generic references to "due process" and "fair trial." Such arguments, this Court has repeatedly held, fail to fairly present federal claims. The claims must, therefore, be either unexhausted or procedurally barred.

Examination of this Court's *Teague* cases reveals some patterns which may help put more structure into previously general verbal formulations. A "new rule" for *Teague* includes any ground for decision which (1) overrules a precedent of this Court on point; (2) elevates an existing nonconstitutional rule to constitutional status; (3) longitudinally extends an existing rule to a situation with an impact on defendant similar in kind but less in degree or to a situation further removed from the core constitutional rule; (4) branches off in a new direction from the old rule to a situation different in kind; or (5) sculpts a specific rule of procedure out of a block of general principle. On the other hand, a rule is not new if it simply applies an existing, specific rule to a situation in which the defendant suffers the same type of harm in the same degree. Also, an application of a rule which must be applied case-by-case as a mixed question of law and fact is not a new rule.

Petitioner in this case attempts to create a new rule in several of the ways stated above. His proposed rule does not come close to qualifying for the second *Teague* exception.

ARGUMENT

I. The present case illustrates the need to clearly and precisely identify the claims in federal habeas proceedings.

A. General Principles.

Petitioner Gray presents the state and federal courts with a moving target. Question 1 in his brief on the merits in this Court is different from the Questions Presented in his certiorari petition. Compare Brief for Petitioner i, with Pet. for Cert. i. These claims are different from the claims presented to the state courts, as discussed further in part II, *infra*.

For over a hundred years, state prisoners have been required to present their federal claims to state courts first, before resorting to federal habeas corpus. See *Ex parte Royall*, 117 U. S. 241, 251-253 (1886); 28 U. S. C. § 2254(b). In addition to enforcing this requirement, federal courts must also determine whether claims are procedurally barred under the rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) or precluded by the rule of *Teague* v. *Lane*, 489 U. S. 288, 301 (1989).[2]

To correctly address these questions, one must have a clear understanding of what the "claim" is. Coherent discussion of whether a claim was fairly presented to the state courts and, if not, whether it is presently barred is not possible if the participants use the term "claim" to refer to completely different things. Much of the confusion in habeas corpus cases results from fuzzy definition of the claims.

A few basic rules for defining the claim come from this Court's decisions on exhaustion and procedural default. First, it has been established for at least 25 years, if not longer, that a mere statement of the facts on which a federal constitutional claim *could* be based does not state such a claim. Second, a petitioner claiming a violation of a particular provision of the federal Constitution must identify that provision to the state court.

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2. If the federal petition is not the first, federal courts must also determine whether the claim is barred by the rule of *McCleskey* v. *Zant*, 499 U. S. 467, 494-495 (1991).

Picard v. *Connor*, 404 U. S. 270 (1971) established and illustrates these rules. Connor complained to the state courts regarding the manner in which he was indicted, citing the state constitution and statutes. *Id.*, at 273. The only federal claim made in his state pleadings was an attempt to "incorporate" the Fifth Amendment's grand jury requirement, *ibid.*, contrary to *Hurtado* v. *California*, 110 U. S. 516, 534-535 (1884). When the federal Court of Appeals held that Connor had satisfied the exhaustion requirement for a federal equal protection claim, this Court reversed, holding that the claim must be "fairly presented." 404 U. S., at 275. "To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts." *Id.*, at 277.

Anderson v. *Harless*, 459 U. S. 4 (1982) further established that a broad reference to the Fourteenth Amendment is not sufficient to fairly present to the state courts a more particular claim. Harless complained to the state courts that his jury's instruction on malice was erroneous, citing several state cases, in one of which "the defendant argued broadly that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments." *Id.*, at 6. This claim is sufficiently different from a claim under *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), that the *Sandstrom* claim was unexhausted. The assertion of "a broad federal due process right to jury instructions that 'properly explain' state law," is a different claim from "the more particular analysis developed in cases such as *Sandstrom, supra*." *Harless*, 459 U. S., at 7 and n. 3. Thus, when a particular line of cases supports the petitioner's argument, that line or at least the reasoning of that line must be brought to the attention of the state courts. A generalized appeal to "due process" is not sufficient.

From *Connor* and *Harless*, it would seem to be obvious that a claim made in state court purely on state law, without even mentioning the federal constitution or laws, is a different claim from any federal claim. Yet, this point needed to be reiterated just last term. *Duncan* v. *Henry*, 130 L. Ed. 2d 865, 868, 115 S. Ct. 887, 888 (1995); *ibid.* (Souter, J., concurring). Henry had contended on direct appeal that certain evidence at his trial was a "miscarriage of justice." *Ibid.*; see Cal. Const., Art. VI,

§ 13 (state standard for reversible error). This is a different claim from an assertion that the same error violates the Due Process Clause of the Fourteenth Amendment.

The problems resulting from ill-defined claims produced a sharp exchange between the majority and dissent in *Engle* v. *Isaac*, 456 U. S. 107 (1982). The majority found the claim procedurally barred, *id.*, at 135, but the dissent discerned a different claim, which was unexhausted and should therefore have resulted in dismissal. *Id.*, at 141 (opinion of Brennan, J.). The majority noted,

> "It is, of course, possible to construe Isaac's confused petition and supporting memorandum to raise the claim described by JUSTICE BRENNAN. Many prisoners allege general deprivations of their constitutional rights and raise vague objections to various state rulings. A creative appellate judge could almost always distill from these allegations an unexhausted due process claim." *Id.*, at 124, n. 25.

Thus, the claims in a habeas petition do not include every claim that might be distilled from a "confused petition and supporting memorandum." A state prisoner on federal habeas corpus is requesting a drastic remedy: the nullification in collateral proceedings of the final judgment of the coequal state judiciary. Cf. *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985). At least where the petitioner is represented by counsel,[3] it is not too much to ask that he state the grounds for such a drastic remedy in specific terms, in both state and federal courts.

A "claim," *amicus* submits, is an assertion that rule of law X applied to facts Y requires result Z. In order to fairly present the claim to the state courts, X, Y, and Z must be stated there in terms specific enough to permit the state court to rule on the claim, without doing counsel's job and reformulating the claim. Citation to the cases supporting the claim is the clearest and most concise way of identifying the rule of law, even if "book and verse" citation is not strictly required. See *Connor*, *supra*, 404

3. Indigent petitioners for whom counsel are not appointed may present special considerations. See *Maleng* v. *Cook*, 490 U. S. 488, 493 (1989) (*per curiam*). As those facts are not presented in this case, *amicus* will not discuss them.

U. S., at 278. *Harless, supra*, makes clear that broad references to due process are not sufficient.

The purpose of habeas review is to force trial and appellate courts to "toe the constitutional mark," *Teague* v. *Lane, supra*, 489 U. S., at 307 (plurality opinion) (internal quote marks and citations omitted), but a mark cannot be "toed" unless it is identified. State courts must be provided with enough definition to find the applicable precedents, for how else can they be expected to obey them? A fulminating petition long on adverbs and short on analysis will therefore "fairly present" few, if any, claims.

B. The Present Case.

With these principles in mind, we turn to the present case. From the statements of fact in the petitioner's pleadings, and from those in the Court of Appeals not denied by the petitioner, the following circumstances regarding the Sorrell evidence might be alleged in support of federal claims:

1. On December 2, 1985, prior to commencement of the guilt trial, defense counsel asked if the prosecution intended to make an issue of the Sorrell murders in the penalty phase. See Pet. for Cert. 3-4.

2. The prosecutor stated that he did intend to accuse Gray of the Sorrell murders, but that the evidence would consist of statements made by Gray to others. *Id.*, at 4.

3. Defense counsel did not investigate the details of the Sorrell case. Brief for Petitioner ("Pet. Brief") 39.

4. On December 5, after the guilt trial and three days later than the defense's original request, the prosecutor disclosed that he intended to introduce additional evidence. Pet. for Cert. 6.

5. The same evening, the police detective submitted to an interview with defense counsel. *Gray* v. *Thompson*, 58 F. 3d 59, 61, 64 (CA4 1995). Petitioner's statements of facts in his petition and brief do not claim that the detective refused to answer any questions asked of him or made any false statements to counsel.

6. The following morning, at the beginning of the penalty phase, defense counsel moved to exclude the additional evidence. Pet. Brief 6-9.

7. The trial judge denied the motion and admitted the evidence. *Id.*, at 9-10.

8. Even though allegedly inadequate notice was the basis for the exclusion motion, trial counsel did *not* move for the alternate remedy of a continuance to conduct the investigation. A three-day continuance would have been a complete cure for the prosecutor's so-called "sucker punch." See *id.*, at 39. "If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded." *Gray*, *supra*, 58 F. 3d, at 64. Petitioner's copious statements of facts contain no denial of this assertion.

9. The trial judge did not order a continuance *sua sponte*.

10. At the evidentiary hearing on federal habeas corpus over seven years later, the detective stated that Mrs. Sorrell's husband had originally been a suspect, along with a few facts which had supported that original suspicion. Pet. Brief 24-27. Petitioner does not allege that defense counsel asked the detective about other suspects the night before the penalty trial or that the detective made any false statements to counsel in this regard.

Evaluating these facts for possible federal claims, the first claim that would seem to fairly jump off the page on facts 3, 8, and 10 is ineffective assistance of counsel. Petitioner's present assertion that no investigation was appropriate because no competent lawyer would introduce details of the crime even if they showed *someone else committed it*, Pet. Brief 40, fails the "straight face" test. Petitioner's fire and brimstone rant about "disinformation . . . disabling defense counsel, " *id.*, at 28, cannot conceal the curability of the allegedly inadequate notice and counsel's lack of request for the cure.

Yet no claim of ineffective assistance has been made to the federal courts. See Memorandum Opinion of April 1, 1993, pp. 7-10 (summarizing claims, ineffective assistance not among them). There may well be a reason known only to the defense

why no such claim lies. We only know that no ineffectiveness claim has been made in the present proceeding.

Conceivably, a lawyer might make a claim that lack of notice of the specific evidence to support the allegation that Gray committed the Sorrell murders is itself a federal constitutional violation. The District Court originally understood that to be the claim and summarily rejected it on the merits. *Id.*, at 10, 11. That would, of course, be a correct decision, as this Court has held repeatedly that there is no constitutional right to discovery. *Weatherford* v. *Bursey*, 429 U. S. 545, 559 (1977); *Wardius* v. *Oregon*, 412 U. S. 470, 474 (1973). Petitioner not only disclaims such an argument in this Court, but asserts he has never made this claim. Pet. Brief 46, n. 37.

A different contention would be that once a prosecutor has stated the evidence he intends to introduce, either voluntarily or in compliance with state law, he is bound by that statement. Although petitioner does not expressly say so, to make that contention on the facts of the present case, one would also have to contend that either (1) exclusion of the additional evidence is the sole permissible remedy for a violation of this rule, since that is the only remedy the defense requested, or (2) the trial court is constitutionally required to order a continuance *sua sponte*, if that is the other remedy the state wishes to make available. For brevity, we will call this the incomplete notice claim.

A variation on the incomplete notice claim would make the rule turn on the prosecutor's intentions at the time of his initial statement. This Court adopted such a distinction in cases where testimony is alleged to have been perjured, which is only a federal constitutional violation if the prosecutor knew at the time it was perjured. *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). An analogous rule would be that it is federal constitutional error for the prosecutor to state what evidence he intends to introduce when he knows at the time of the statement that he actually intends to introduce additional, undisclosed evidence. Again, however, to make a claim of real injury on the facts of the present case, the rule would also have to include a requirement that the trial court either exclude the evidence on motion or order a continuance *sua sponte*. For lack of a better label, we will call this the "sandbagging" claim.

Finally, there is petitioner's sole contention on established law, that the prosecution failed to disclose evidence known to it which was materially exculpatory as to penalty. This is the rule of *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

With the claims defined, we can turn to the questions of whether they are properly before the federal court on habeas, and, if so, whether they state grounds for habeas relief. This Court has said that the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) is a "threshold question in every habeas corpus case," *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 245, 114 S. Ct. 948, 953 (1994), but has not said whether it should be addressed before the issues of exhaustion and procedural default. *Amicus* will address the exhaustion/default issues first, because they go to the question of whether the claims are properly before the federal courts in this case, and then address the *Teague* issues, which go to the question of whether the claims are the kinds of claims for which habeas relief is properly granted. See *Mackey* v. *United States*, 401 U. S. 667, 684 (1969) (opinion of Harlan, J.); *Bohlen*, 127 L. Ed. 2d, at 245, 114 S. Ct., at 953 (*Teague* issue "fairly included" in question of the merits).

II. None of petitioner's claims before this Court was fairly presented to the state courts.

The rules of exhaustion and procedural default have different theoretical bases. Exhaustion is a rule of comity between state and federal courts. See *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982). Procedural default is based on the principle that when a claim is defaulted the state judgment rests on independent state grounds and not on a reviewable determination of a federal question. See *Harris* v. *Reed*, 489 U. S. 255, 260 (1989). Yet the two doctrines are linked by the fact that a claim is deemed exhausted, even though never fairly presented to the state courts, if there is no longer any remedy available there, *i.e.*, if it is procedurally defaulted. See *Castille* v. *Peoples*, 489 U. S. 346, 350 (1989).

Just as the defendant can default his claims by not raising them at the proper time in state court, so the prosecution can lose this defense by not asserting it when required. See *Engle* v.

Isaac, 456 U. S. 107, 124-125, n. 26 (1982); but see *Granberry* v. *Greer*, 481 U. S. 129, 131 (1987) (belated unexhaustion claim discretionary). However, if the state court rules on the merits rather than relying on default, then the claim is reviewable on federal habeas. See *Harris*, *supra*, 489 U. S., at 263. Analogously, then, if the District Court has ruled on procedural default, whether or not raised by the state, that issue should be reviewable in the Court of Appeals. As the prevailing party in the Court of Appeals, respondent can assert here any ground which would have been a valid basis for decision there, even if that court's decision was on another ground. *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970). The present case is distinguishable from *Schiro* v. *Farley*, 127 L. Ed. 2d 47, 56, 114 S. Ct. 783, 788 (1994), in that the Commonwealth did raise default at the petition stage. Brief in Opposition i.

In the present case, the District Court characterized the claims arising out of the admission of the Sorrell evidence as a single claim and held that the claim "was consistently raised in the State courts and is not procedurally defaulted." Pet. Brief 19, quoting Memorandum Opinion on Order Denying Judgment 3-4. The correctness of that ruling is properly before this Court.

A. The Incomplete Notice Claim.

In evaluating whether a claim has been fairly presented, the principal focus should be on the appellant's own statement of the claim. Most reviewing courts require a statement of the issues somewhere other than the body of the argument. See, *e.g.*, Supreme Court Rule 14.1(a) (questions presented); Fed. Rule App. Proc. 28(a)(3) (issues presented for review). In the heading to his argument on the Sorrell evidence on direct appeal, counsel for Gray stated the claim thusly:

> "The trial court erred in overruling Gray's objection to the admission of certain evidence, at the penalty phase regarding other crimes which the Commonwealth alleged Gray committed, but for which Gray had never been charged, indicted, tried, or convicted. (Assignment of Error #41)." Brief on Appeal 1 (capitalization normalized).

This would appear on its face to be an argument about the general admissibility of evidence of prior, uncharged miscon-

duct, a question generally within the realm of state evidence law and not the federal Constitution. No opinion of this Court recognizes this issue to be one of federal constitutional law, and the last opinion discussing such issues expressly reserved that question. *Estelle* v. *McGuire*, 502 U. S. 62, 67-68 (1991).

The body of the argument, pages 1 to 4, confirms this impression. Gray cited only one federal constitutional case, *Lee* v. *Illinois*, 476 U. S. 530 (1986), to support his objection to the testimony of the accomplice, Melvin Tucker. That is the evidence which the defense *was* notified would be presented and thus is irrelevant to the claims before this Court.

For his lack of notice point, Gray cited *Peterson* v. *Commonwealth*, 225 Va. 289, 302 S. E. 2d 521, 526 (1983), which is a decision stating the "preferred practice" and not a constitutional rule. The only other citations in the argument are to cases where evidence of prior uncharged crimes was admitted, with discussion of why they are distinguishable. The only mention of the Constitution with regard to the evidence at issue here is in the final paragraph:

> "Gray's counsel were not advised that Det. Slezak would testify or that color photographs would be offered, until the conclusion of the 'Guilt Trial' on December 5, 1985. To permit such evidence as the details of the Sorrell murders, enlarges the scope permitted by *Watkins* [a state case] to such an extent that Gray's right to a fair trial, as guaranteed by the U. S. and Virginia Constitutions, was violated."

The situation is strikingly similar to *Picard* v. *Connor*, 404 U. S. 270 (1971) and *Anderson* v. *Harless*, 459 U. S. 4 (1982). We have a meritless reference to one federal point, cf. *Connor*, 404 U. S., at 277, and a single assertion without citation in the broadest possible terms, due process in *Harless*, 459 U. S., at 7, and fair trial in the present case. The state court properly understood the claim to be one of admissibility under state evidence law and analyzed it accordingly. *Gray* v. *Commonwealth*, 233 Va. 313, 346, 356 S. E. 2d 157, 175 1987); cf. *Harless*, 459 U. S., at 7.

On pages 45-46 of his brief, petitioner makes the following assertion:

> "[T]he state, including in the sentencing phase of a capital trial, may not engage in conduct which affirmatively misleads opposing counsel in such a way so as to deny the defendant a meaningful opportunity to develop his response, to explain, or to rebut the state's presentation on an issue the state itself has made determinative of the outcome. Although the Virginia Supreme Court held to the contrary, the 'short answer' to the state court's decision is that it 'made a serious mistake.'"

Petitioner, not the Virginia Supreme Court, is seriously mistaken. That court made no such ruling for the simple reason that no such argument has ever been presented to it. The state court was presented with an objection to the admission of evidence, not a claim of denial of due process through prosecutor misconduct. Had Gray objected to the timing problem as such, distinct from his claim that the evidence was inadmissible, we would now have a ruling on whether his failure to move for a continuance defaulted that objection under state law. Cf. *Dugger* v. *Adams*, 489 U. S. 401, 408 (1989) (state court default deprived federal courts of ruling on predicate question of state law). We do not have that ruling because petitioner did not fairly present that question on appeal.

Next, we move to the state habeas petition. Counsel for Gray in this Court chooses to quote the body of the argument supporting the claim for his characterization of the claim. Pet. Brief 13. Again, *amicus* believes that the better practice is to look first at state habeas counsel's own statement of the claim: "IX. The Commonwealth introduced unfairly prejudicial testimony and other evidence regarding the Sorrell murders in order to establish future dangerousness."

The body of the argument cites the same cases as the direct appeal brief. Compare Petition for Writ of Habeas Corpus [State] 37-39, with Brief on Appeal 1-4. *Gregg* v. *Georgia*, 428 U. S. 153 (1976) is cited only in the negative, that it "did not go so far as to allow the kind of evidence such as the Sorrell murders which the Commonwealth introduced in this case." Petition for Writ of Habeas Corpus 38. The paragraph which petitioner quotes selectively reads in its entirety as follows:

"76. The Commonwealth did not disclose its intention to use the Sorrell murders as evidence until such a late date that it was impossible for Gray's defense counsel to reasonably prepare for its use. Gray was literally tried and convicted in Suffolk of an uncharged and unproved offense in Chesapeake, by the use of what amounts to no standard of proof. The evidence was entirely circumstantial except for the testimony of Gray's co-defendant Tucker, who testified pursuant to a plea bargain. The only fair defense would be either the requirement of proof beyond a reasonable doubt or for the defendant's innocence to be proved. The first was not achieved and the second was impossible, *and in fact no amount of preparation time on the part of defense counsel would have been adequate*. See J. A. at 1374-1375 for a lay opinion of the fundamental fairness of this aspect of the case. The use of such proof and the way in which it was used was simply outrageously unfair and made a mockery of Gray's rights to due process of law under the Fourteenth Amendment and the Virginia Constitution." *Id.*, at 39-40 (italics added; underline in original).

The errors apparently claimed by this paragraph are the admission of the evidence and the lack of an instruction to the jury on a burden of proof for prior offenses.[4] Far from claiming error in the court's failure to grant more preparation time, state habeas counsel disclaimed such a remedy. The only federal constitutional argument is a generic reference to due process, which was found insufficient in *Harless, supra*.

Within a unitary judicial system, it is a common rule that collateral attack generally cannot be used either for claims that were raised and rejected on appeal or for claims that could have been made on appeal but were not. The federal courts follow these rules in 28 U. S. C. § 2255 cases, see 2 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure §§ 41.4a,

4. Some states have such a rule, but it is not a constitutional mandate. See, *e.g.*, *People* v. *Robertson*, 33 Cal. 3d 21, 54, 655 P. 2d 279, 298 (1982) (acknowledging new statute could have overturned rule, though holding it did not); see also *Dowling* v. *United States*, 493 U. S. 342, 348 (1990) (prior offense introduced as evidence need not be proven beyond a reasonable doubt).

41.7c, pp. 1197, 1223 (2d ed. 1994), and so do the courts of Virginia on state habeas. *Hawks* v. *Cox*, 211 Va. 91, 175 S. E. 2d 271, 274 (1970); *Slayton* v. *Parrigan*, 215 Va. 27, 207 S. E. 2d 680, 682 (1974).

Gray's state habeas petition gave the state courts no reason to believe his habeas claim IX was a different claim from his assignment of error #41 on appeal. The phrasing of the claim was substantially the same. The same cases were cited in argument. Neither asserted any federal authority against the evidence now in question beyond the generic references to due process and fair trial. In the Virginia Supreme Court, state habeas counsel went so far as to expressly state that he was asking for reconsideration of the same claim. "VIII. This Court Should Reexamine [Its] Ruling in *Gray* v. *Commonwealth*, 233 Va. 313, 356 S. E. 2d 157 (1987) a[s] It Relates to Gray's Claim IX and the Sorrell Murders." Petition for Appeal 28. On page 31, habeas counsel asserted he was presenting "a different treatment of the issues," but did not claim a different issue. Not surprisingly, both courts denied relief under the *Hawks* rule.[5]

In summary, on neither appeal nor state habeas did counsel for *Gray* present the incomplete notice claim to the Virginia courts. They certainly had the "tools to construct their constitutional claim." See *Engle* v. *Isaac*, 456 U. S. 107, 133, 145 (1982). *Smith* v. *Estelle*, 602 F. 2d 694 (CA5 1979) had been decided 11 years earlier. The decision to pursue other claims instead may very well have been a rational decision that the claim was weak and should properly be winnowed out. See *Murray* v. *Carrier*, 477 U. S. 478, 484 (1986). For whatever reason, it was not fairly presented to the state courts within the meaning of *Connor*, *Harless*, and *Henry*.

5. Petitioner notes that the Virginia Supreme Court only made its "plain statement" of procedural bar on the prompting of the Commonwealth. Pet. Brief 14, n. 11. It does not matter. Five months later this Court decided *Ylst* v. *Nunnemaker*, 501 U. S. 797, 804 (1991). Under the "look through" rule of that case, the plain statement of the circuit court would have sufficed.

B. The Sandbagging Claim.

As noted earlier, a variation on the incomplete notice claim adds the factual element that the prosecutor knew at the time of his representation that it was false. *Smith* itself did not place great weight on such a finding, holding that the claim would lie either way. 602 F. 2d, at 702. Even so, petitioner asserts it strongly in this Court.

The additional factual element makes the sandbagging claim one that could not have been raised on direct appeal, as the appellate record does not contain any statement by the prosecutor of such nefarious intent.[6] To be presented to the state courts, it would have to be presented on state habeas, but it was not. The state habeas pleadings are devoid of any reference to the fact now asserted. Petitioner did not ask for an evidentiary hearing on the Sorrell evidence questions other than a somewhat confused reference to "establish[ing] the fact that they did likely have an effect on the jury." J. A. 115-116. Gray appealed the denial of an evidentiary hearing on other claims, but not on this one. J. A. 120-124.

As with the incomplete notice claim, the legal basis of this claim was never fairly presented to the state court. In addition, the factual basis was never presented. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 11-12 (1992); *Gray* v. *Thompson*, 58 F. 3d 59, 68 (CA4 1995) (Hall, J., concurring).

C. The Brady Claim.

The *Brady* claim, like the sandbagging claim, depends on facts not *actually* known to defense counsel at trial, on appeal, or apparently on state habeas. These facts may well have been readily available, as the detective did submit to an interview by

6. More precisely, petitioner has not called the attention of the Court or counsel to any such indication in the trial record, which we may safely assume he would if it existed. See Brief for Petitioner 6-9. He refers only to the federal habeas proceedings for this assertion. See, *e.g.*, *id.*, at 38. If the fact now urged upon the court with such vigor was so important, it seems strange that trial counsel did not simply ask the prosecutor if he had known all along that he intended to present the additional evidence.

defense counsel prior to testifying, but we can assume for this argument they were not actually known.

Nothing which even remotely sounds like a *Brady* claim appears in petitioner's state pleadings regarding the Sorrell matter.

D. Effect of Failure to Present.

Absent a deficiency in state procedures, a claim which has never been fairly presented to the state courts *must* be either unexhausted or procedurally barred. The codification of the exhaustion rule can be found in 28 U. S. C. § 2254(b) and (c):

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Absence of state corrective process would exist in a state which did not allow appeals in criminal cases,[7] or which did not have some collateral review procedure for the adjudication of claims outside the appellate record. Few, if any, states are so deficient in their review procedures today, and so this clause is rarely, if ever, invoked. The provision for "circumstances rendering such process ineffective" was important in a bygone era. Congress probably had *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) in mind. Again, though, such circumstances are rare to nonexistent today.

On its face, the exhaustion language would appear to prohibit federal habeas review of a claim for which the defendant once

7. There is no constitutional requirement to provide appeals. See *Douglas* v. *California*, 372 U. S. 353, 356 (1963).

had a state remedy but which he allowed to lapse, whether intentionally or inadvertently. This is, in fact, how the language was construed soon after its enactment. "The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." *Brown* v. *Allen*, 344 U. S. 433, 487 (1953).

That interpretation has since been abandoned, however, and the remedies referred to in section 2254(b) are now thought to be only those still available at the time of the federal petition. See *Engle* v. *Isaac*, 456 U. S. 107, 125-126, n. 28 (1982). Thus, where the "fair presentation" requirement has not been met, "[t]he requisite exhaustion may nonetheless exist . . . if it is *clear* that [the habeas petitioner's] claims are now procedurally barred under [state] law." *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989) (emphasis added). In this situation, *Harris* v. *Reed*, 489 U. S. 255 (1989) is inapplicable, *Teague* v. *Lane*, 489 U. S. 288, 298-299 (1989), and the federal court must examine state procedural default law itself. See *id.*, at 297-298 (examining Illinois default law).

Because the consequence of nonexhaustion is dismissal of the entire petition, *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982),[8] a petitioner who has not met the fair presentation requirement can avoid dismissal only by showing that his own claim is, in fact, procedurally barred in state court. Under the rule of *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), however, that same showing will bar a grant of relief unless the exceptions to the procedural default rule can be met.

If petitioner's claims are now procedurally barred in state court, as seems likely from the strictness of Virginia's default rules applied in this case, *Murray* v. *Carrier*, 477 U. S. 478,

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8. *Lundy* predated *Teague*, which greatly narrowed the authority of habeas courts to grant relief on the kinds of creative claims which are especially likely to emerge as unexhausted habeas claims. Given that both the unequivocal wording of the statute and the comity policy which underlies it only forbid a *grant* of relief on an unexhausted claim and not a *denial* of relief, both efficiency and federal-state relations would be better served by permitting federal habeas courts to deny unexhausted claims which are either meritless on their face or *Teague*-barred.

482-483 (1986), *Smith* v. *Murray*, 477 U. S. 527, 533 (1986), and *Coleman* v. *Thompson*, 501 U. S. 722, 727-728 (1991), then relief cannot be granted unless the cause and prejudice test is met.

The concurring judge on the Court of Appeals panel, the only one to address the issue, thought Gray's failure to meet this test so obvious as to only warrant a single sentence. *Gray* v. *Thompson*, *supra*, 58 F. 3d, at 68 (Hall, J. concurring). Petitioner's brief makes no effort to dispute this holding. Therefore, all of the claims before this Court may properly be denied as procedurally barred.

III. The "sandbagging" claim is *Teague*-barred.

Discovery violations occur every day in American courts; the difficult question is what to do about them. Exclusion of the offending party's evidence is generally regarded as a drastic sanction, reserved for extreme cases. See, *e.g.*, Cal. Penal Code § 1054.5(c).

The present case is a mirror image of *Taylor* v. *Illinois*, 484 U. S. 400 (1988). In that case, as in this one, the defendant sought to make a federal constitutional issue out of the remedies for discovery violations in state court. In that case, it was defense counsel who tried to call a last minute witness, and the trial court found this to be a willful violation. *Id.*, at 405-406. The Court rejected the "argument that preclusion is *never* a permissible sanction for a [defense] discovery violation," declining "to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.*, at 414 (emphasis in original).

While Taylor argued that less drastic sanctions were available and should have been used, *id.*, at 413, Gray's failure to ask for less drastic sanctions and insistence that admission of the evidence was constitutional error must logically rest on a premise that any lesser sanction would be constitutionally inadequate. He invites this Court to open a can of worms, federalizing and constitutionalizing the question of when state court judges *must* exclude evidence as a sanction for discovery violations. This Court has, on a number of occasions, recognized the problems

in making constitutional issues out of violations of nonconstitutional rules. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293, 2299-2300 (1995); *United States* v. *Caceres*, 440 U. S. 741, 755 (1979); Brief of the Criminal Justice Legal Foundation as *Amicus Curiae* in *Whren* v. *United States*, No. 95-5841, pp. 9-15.

This rule would not be new, he says, because it follows from the principle of reliability in capital sentencing information established in *Gardner* v. *Florida*, 430 U. S. 349 (1977). Brief for Petitioner 45. If this argument sounds hauntingly familiar, it is with good reason. That was *precisely* the argument made and rejected in *Sawyer* v. *Smith*, 497 U. S. 227, 235-236 (1990).

Indeed, the present case is such a straightforward application of *Sawyer* as to render it "uncertworthy." If the *Teague* issue in this case is worthy of the Court's plenary attention, it would seem to be because of the complaint of *Turner* v. *Williams*, 35 F. 3d 872, 887, n.16 (CA4 1994) that this Court's *Teague* decisions have been inconsistent and unclear.

The concurring judge in the Court of Appeals panel found language in *Turner* to be inconsistent with the panel majority's straightforward application of this Court's *Teague* precedents, and then resolved that dilemma by following the circuit precedent instead of this Court's precedents. *Gray v. Thompson*, 58 F. 3d 59, 67-68 (CA4 1995) (opinion of Hall, J.). This last step is as erroneous as it is surprising. *Turner* strayed far afield, and much of its language is irreconcilable with this Court's precedents. It is wrongly decided and should be expressly disapproved.

A. Summary of Teague Cases.

Since the verbal formulations of what is a "new rule" have apparently provided insufficient guidance, it may be appropriate at this point to summarize the holdings of this Court's *Teague* cases to date.

Three cases involve the rule of *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality). That rule is that the sentencer in a capital case may not be precluded from considering *any* circumstance the defendant puts forward as mitigating.

Penry v. *Lynaugh*, 492 U. S. 302, 319 (1989) held that application of *Lockett* to a Texas case where the proffered mitigating circumstance would not tend toward a favorable answer on any of the special sentencing questions would not be a new rule. The *Penry* Court noted that approval of the Texas system in *Jurek* v. *Texas*, 428 U. S. 262, 272 (1976) (lead opinion) had been expressly based on an assurance not met in Penry's case. 492 U. S., at 319.

Saffle v. *Parks*, 494 U. S. 484, 490 (1990), however, held that *Lockett* did not, of its own force, govern *how* the jury was to consider the mitigating circumstance. Hence, a prohibition against instructing the jury not to consider sympathy would have been a new rule.

Finally, *Graham* v. *Collins*, 122 L. Ed. 2d 260, 275, 113 S. Ct. 892, 902 (1993) held that application of *Lockett* in Texas to require additional instruction on youth as mitigation, when the "future dangerousness" issue did permit *some* consideration of youth, would be a new rule.

Each of the other *Teague* cases involves a different rule. *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) forbade police to ask again for a *Miranda* waiver when an in-custody suspect has already requested counsel once. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) held that application of this rule to a situation where the prior refusal was for a different offense would be a new rule.

Sawyer v. *Smith*, *supra*, 497 U. S., at 235-236, held that application of such general principles as reliability in sentencing to forbid a specific type of prosecutor argument would be a new rule. *Sawyer* also held that taking a nonconstitutional rule of evidence or procedure and raising it to constitutional status would be a new rule. 497 U. S., at 239.

Godfrey v. *Georgia*, 446 U. S. 420, 428-429 (1980) held that an aggravating circumstance of "outrageously or wantonly vile, horrible and inhuman" was too vague to properly narrow application of the death penalty. *Stringer* v. *Black*, 503 U. S. 222, 228-229 (1992) held (and the state conceded) that application of this rule to a circumstance of "especially heinous, atrocious, or cruel" was not a new rule.

Stringer also held that application of this rule to states which follow the Florida model, limiting aggravating circumstances in the final "weighing" stage to those listed in the statute, was not a new rule. Invalid aggravators cause the defendant more harm in such states than in those such as Georgia, where the final stage is wide open.[9]

Stringer also held that it was not a new rule to classify Mississippi's system with the Florida model, rather than with Louisiana, in which the second tier of narrowing is constitutionally redundant. 503 U. S., at 233. This holding was based on Mississippi Supreme Court decisions, *id.*, at 234, on the premise that the federalism concerns underlying *Teague* do not apply when the highest court of the state has already accepted the argument in question. *Id.*, at 235.

Gilmore v. *Taylor*, 124 L. Ed. 2d 306, 319, 113 S. Ct. 2112, 2118 (1993) refused to create, on habeas, a constitutional rule against jury instructions that, at most "created a risk that the jury would fail to consider evidence that related to an affirmative defense . . . ." General phrases in one case involving a claim of *Lockett* error and another involving harmless error analysis of unconstitutional presumptions did not save this proposal from the "new rule" bar. *Id.*, at 318, 113 S. Ct., at 2118.

Bullington v. *Missouri*, 451 U. S. 430 (1981) held that the Double Jeopardy Clause extends to capital sentencing proceedings, giving as rationales both the trial-like nature of the proceedings, *id.*, at 438, and the unique considerations of capital sentencing. *Id.*, at 441-442, n. 15. A fair reading of the opinion, though, shows that the trial-like nature was the predominant rationale. Even so, *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 247-248, 114 S. Ct. 948, 955 (1994) held that extension of *Bullington* to noncapital sentencing, however trial-like, would be a new rule. This holding was based as much on subsequent cases' treatment of *Bullington* as it was on *Bullington* itself.

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9. *Stringer* and other cases refer to the two types as "weighing" and "nonweighing" states. This terminology may be ripe for reconsideration. See *Flamer* v. *Delaware*, 68 F. 3d 736, 748 (CA3 1995) ("quite misleading"); *id.*, at 766-767 (Lewis, J., dissenting).

Finally, *Goeke* v. *Branch*, 131 L. Ed. 2d 152, 115 S. Ct. 1275 (1995) (*per curiam*) illustrates the depth of misunderstanding of *Teague*, or perhaps stubborn resistance to it, remaining in some Courts of Appeals. Branch was a fugitive whose appeal was dismissed. A precedent of this Court held that such dismissals were not a constitutional violation. *Allen* v. *Georgia*, 166 U. S. 138, 140 (1897). Based only on a nonconstitutional federal case under this Court's supervisory power and on a right-to-counsel case forbidding dismissal for counsel's unprofessional errors, the Eighth Circuit held that forbidding fugitive dismissals would not be a new rule. *Branch*, 131 L. Ed. 2d, at 158, 115 S. Ct., at 1277. This Court summarily, unanimously reversed.

Based on the facts and results of these cases, a few observations about new rules can be made. *Amicus* offers these not as changes to the verbal formulation of *Teague*, but as somewhat more concrete guides regarding how this Court has actually applied those formulations.

Precedent on Point. If an unreversed precedent of this Court says practice X is constitutional, then a rule that practice X is unconstitutional is new. See *Parks*, *supra*, 494 U. S., at 488; see also *Branch*, 131 L. Ed. 2d, at 159, 115 S. Ct., at 1278. Even before *Teague*, the lower federal courts had no authority to declare an old Supreme Court precedent superseded. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983) (*per curiam*).

Prior Nonconstitutional Rule. Where the rule in question has been in effect but has always been understood to be nonconstitutional, the elevation of that rule to constitutional status is new. See *Sawyer*, *supra*, 497 U. S., at 238-239; *Branch*, 131 L. Ed. 2d, at 158, 115 S. Ct., at 1277.

Longitudinal Extension. This is the most common type of new rule. A rule is new if it extends an existing rule to a situation where the impact on the defendant is similar in kind but less in degree. Similarly, where the new application is a step further removed from the core constitutional right, that is a new rule. Lockett and Penry both suffered the same injury in the same degree. Their juries were allowed to consider some mitigating circumstances, but were forbidden to consider *at all* the most compelling circumstance in the case. Graham, by

contrast, was less handicapped in arguing his case. His jury could consider his mitigating circumstances, but not in every way he wished. *Graham* v. *Collins*, *supra*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902.

Application of the *Godfrey* rule to the "especially heinous" circumstance, see *Stringer*, *supra*, is not an extension. "Heinous" is not less vague than "vile," and "especially" is no better at narrowing than "outrageously." Application of that rule to Florida-type systems is a movement in the opposite direction, since the impact of vague aggravations is greater there.

Butler is an example of a rule being extended further from the core constitutional right. *Miranda* v. *Arizona*, 384 U. S. 436 (1966) created a protective buffer zone around the privilege against self-incrimination. *Edwards* v. *Arizona*, *supra*, similarly created a buffer to protect incarcerated suspects from being badgered into waiving *Miranda*. That danger is further reduced when the police request a waiver for the first time for a different crime. *Arizona* v. *Roberson*, 486 U. S. 675, 690 (1988) (Kennedy, J., dissenting). Thus the *Roberson* rule broke new ground, even further away from the core of the Fifth Amendment.

It does not matter, for this purpose, if the extension of the existing rule is "only a 'short step.'" *Bohlen*, *supra*, 127 L. Ed. 2d, at 250, 114 S. Ct., at 957. So long as it is an extension further from the constitutional core or to a lesser interest of the defendant, it is a "new rule."

Branching Off. Somewhat different from the longitudinal extension is an attempt to branch off in a new direction, not necessarily further from the core right, but different in kind from the existing rule. Parks wanted his jury to consider sympathy for him in its deliberations. Sympathy may be a more powerful argument for the defendant than some of the more extreme applications of *Lockett*, see, *e.g.*, *Boyde* v. *California*, 494 U. S. 370, 382, n. 5 (1990) (prison choreography award as "mitigating"), but it is different in kind from what *Lockett* requires, so it would have been a new rule. *Parks*, *supra*, 494 U. S., at 490.

Specific from General. In the cases finding applications of old rules, rather than creation of new ones, the old rule invariably addressed a specific practice. *Penry* was merely an

application of *Lockett*, addressing the specific issue of instructing juries on mitigating circumstances in capital cases. *Stringer* was an application of *Godfrey*, regarding the specificity required for a death-eligibility circumstance.

In contrast, the sculpting of a specific rule of procedure out of a block of general principle has invariably been considered a new rule. The rule forbidding prosecutor arguments misleading the jury about appeals, though based on the need for reliable sentencing, was nonetheless new. *Sawyer*, *supra*, 497 U. S., at 235-236.

The same is true of the proposed rule with regard to jury instructions in *Gilmore* v. *Taylor*, 124 L. Ed. 2d, at 319, 113 S. Ct., at 2118, even though based on due process grounds. The requirement of proof beyond a reasonable doubt "has spawned a number of corollary rules . . . ." *Id.*, at 323, 113 S. Ct., at 2122 (O'Connor, J., concurring in the judgment). Yet the rule Taylor sought was not one of those corollaries. His rule would have required a new, specific rule derived from the broad principle. That would be a new rule.

In *Goeke* v. *Branch*, *supra*, 131 L. Ed. 2d, at 157-158, 115 S. Ct., at 1277, it was error to strike down a state's fugitive dismissal rule without specific constitutional precedent dealing with that particular aspect of criminal procedure, merely because the Court of Appeals felt that the rule was "arbitrary" and "oppressive." That would have been a new rule.

Mixed Questions. A different situation is presented by those rules which will *always* depend on the specific facts of the individual case. The application of *Jackson* v. *Virginia*, 443 U. S. 307 (1979), for example, will always present a mixed question, and its resolution will always require a detailed factual discussion. See *Wright* v. *West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). There is only one *Jackson* rule, that the evidence must be sufficient that a reasonable fact-finder could convict, but it must be applied anew to each case.[10] "Custody" for the *Miranda* rule, see *Thompson* v.

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10. An attempt to define a category of evidence and create a specialized rule for that category would, however, be a new rule. See *id.*, at 315 (Souter, J., concurring in the judgment).

Keohane, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995), "materiality" for the *Brady* rule, see *Kyles* v. *Whitley*, 131 L. Ed. 2d 490, 508, 115 S. Ct. 1555, 1567 (1995), and "prejudice" for ineffective assistance, see *Strickland* v. *Washington*, 466 U. S. 668, 693 (1984), are other examples of case-by-case, "look at all the circumstances" rules. Each of these rules deals with a specific aspect of criminal procedure and sets a standard for application. None of them is the kind of general principle petitioner seeks to invoke in this case.

Comparing the present case with the earlier case, it is clear petitioner seeks to create a new rule. He cannot cite an existing rule which is anywhere near as specific as the *Lockett* rule cited by Penry or the *Godfrey* rule cited by Stringer. *Mooney* v. *Holohan*, 294 U. S. 103, 110 (1935) involved an allegation of fraud on the court and the defendant vastly greater in magnitude than anything the prosecutor is accused of here. *Lankford* v. *Idaho*, 500 U. S. 110 (1991) (decided long after Gray's sentence became final) involved a surprise as to the *entire* penalty phase, not mere items of evidence in it.

The notion that the prosecutor's failure to disclose each item of evidence he intends to put on in the penalty phase, even if intentional, *must* be remedied by exclusion of the evidence, and not by any lesser sanction, would surely be a new constitutional rule. So, too, would a rule that if continuance is the remedy it must be ordered *sua sponte*. Petitioner's contention is a proposal for a new rule under *Teague*.

B. Turner v. Williams.

The concurring judge in the present case based his rejection of the *Teague* argument on *Turner* v. *Williams*, 35 F. 3d 872 (CA4 1994), cert. denied, 131 L. Ed. 2d 216 (1995). Because that case is a prime example of misunderstanding *Teague*, it is appropriate to take a closer look.

Turner's claim was an attack on the Virginia "vileness" factor, which on its face is the same as the one struck down in *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980). *Turner*, 35

F. 3d, at 880 and n. 7.[11] *Godfrey* differed from *Turner*, though, in that Turner's jury received limiting definitions of the vague terms of the bare instruction, while Godfrey's jury did not. *Id.*, at 880, 891-892.

The *Turner* majority states at one point "we are satisfied that a state court in 1988 would have felt *compelled* to conclude that *Godfrey* and *Cartwright dictate* the rule or result Turner seeks," *id.*, at 882 (emphasis added), but ten pages later finds Turner's claim to be without merit. See *id.*, at 892. This is a contradiction.

Surely "reasonable minds," see *Butler* v. *McKellar*, *supra*, 494 U. S., at 415, can always reach the correct result. A correct application of precedent cannot be "an illogical or even a grudging application." See *ibid*. Certainly a correct interpretation is also a "reasonable interpretation." See *Caspari* v. *Bohlen*, *supra*, 127 L. Ed. 2d, at 249, 114 S. Ct., at 956. On a question of pure law, as opposed to a mixed question of law and fact, a wrong rule is *per se* a new rule.

The *Turner* majority thought the dissent "overlooks the significance of *Wright* v. *West*," 35 F. 3d, at 886, n. 14, but *West* has little significance as precedent. As a case with no majority opinion, the holding of *West* is that of the opinion concurring on the "narrowest grounds," *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (internal quotations omitted), which is simply that the facts of the case pass the *Jackson* standard. See *West*, *supra*, 505 U. S., at 297 (White, J., concurring in the judgment). *West* simply establishes *no* precedent on the *Teague* question. The several opinions in the case have value as explanation, but not precedent.

The rule existing before and after *West* is that a mixed question of law and fact is renewed *de novo* on habeas corpus. *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985); *Thompson* v. *Keohane*, 133 L. Ed. 2d 383, 394, 116 S. Ct. 457, 465 (1995). The relationship between this rule and *Teague* is explained in Justice Kennedy's concurring opinion in *West*. "If the rule in question is one which of necessity *requires a case-by-case*

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11. Gray attacked the same factor in question 3 in his certiorari petition in the present case, but this Court has declined to hear it.

examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." 505 U. S., at 308 (emphasis added).

The *Turner* majority quotes this statement but fails to understand it. A facial attack on a statute or a standard jury instruction, such as the one in *Turner*, does *not* require case-by-case evaluation of the evidence. Hence it does not fall into the same category as the rule of *Jackson* v. *Virginia*.

The *Turner* majority said that Turner "seeks the benefit of a rule that a vague aggravating factor must be supplemented with constitutionally sufficient limiting instructions or appellate review." 35 F. 3d, at 880. That is too broad a definition of the "rule." When jury instructions are attacked as unconstitutional in all or most cases, not just on the peculiarities of an unusual case,[12] and the state asserts *Teague*, "[t]he question is whether reasonable jurists could disagree over whether *the particular erroneous instruction at issue here* . . . violated the Constitution." *Gilmore* v. *Taylor*, 124 L. Ed. 2d 306, 323, 113 S. Ct. 2112, 2121-2122 (1993) (O'Connor, J., concurring in the judgment) (emphasis added);[13] see also *id.*, at 320, n. 3, 113 S. Ct., at 2119, n. 3 (plurality) (long-established standard instruction is "strong evidence of the reasonableness of the interpretation").

The *Turner* majority also relied on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), which it said was a novel *specific* holding even though not "new" for *Teague*. See 35 F. 3d, at 884. That is how the *Penry* dissent sees the holding, 492 U. S., at 352-353 (opinion of Scalia, J.), and if the dissent were correct *Penry* would be wrongly decided. The majority, however, sees itself as merely enforcing a reservation expressly made in the original opinion upholding the Texas death penalty law, "that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a

12. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 274 and n. 3, 113 S. Ct. 892, 901 and n. 3 (1993) (distinguishing *Penry*).

13. The word "erroneous" in this passage refers to an error of state law.

defendant might present." *Id.*, at 318. The rule having been established with that specific reservation, the enforcement of that reservation in a particular case was not a new rule.

While the Fourth Circuit in *Turner* was correct that *Teague* did not alter the *standard* of review on habeas, 35 F. 3d, at 886, the rule we now call *Teague* was intended from the beginning to alter the *scope* of claims cognizable on habeas corpus. See *Mackey* v. *United States*, 401 U. S. 667, 684 (1969) (opinion of Harlan, J.). The magnitude of this restriction was increased when this Court adopted a variation on Justice Harlan's theme which both broadened the definition of "new," see *Teague*, 489 U. S., at 301, and narrowed the second exception. See *id.*, at 312-313; see also *id.*, at 330-331 (Brennan, J., dissenting) (departure of *Teague* from original Harlan proposal).

This change in the scope of habeas also changed substantially the role of the lower federal courts. They had previously been mini Supreme Courts, with the power to invent new rules and impose them *de facto* on the state courts, even though they had no legal authority to bind state courts under *stare decisis*. See *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 193, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring). This power was often abused; some of the decisions were blatant evasions of this Court's precedents. Compare *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988) (jury required in Arizona capital sentencing), with *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990) (issue settled years earlier).

After *Teague*, the habeas function is limited to enforcing this Court's existing precedents and not making new rules. This is a less powerful and less personally rewarding task. Breaking new ground is the exciting part of appellate law, yet that is precisely what *Teague* forbids. See 489 U. S., at 301. Resistance to this change in decisions such as *Turner* should not be surprising, but it should be disapproved.

C. The Present Case.

Application of the foregoing *Teague* principles to the present case is straightforward. Petitioner's proposed rule falls within the category of a specific rule sought to be derived from a very broad, general principle. *Sawyer*, *Taylor*, and *Branch*, rejected

such claims. See *supra*, at 25. To the extent that his claim could be said to flow from *Gardner* v. *Florida*, he seeks to extend that case both farther from its core and to an entirely different kind of harm. Insufficient notice of evidence presented in open court is both vastly less harmful than Star Chamber secrecy and qualitatively different from it. No precedent of the type of *Jackson*, *Strickland*, *Miranda*, or *Brady*, setting a standard for a specific aspect of procedure but necessarily applied case-by-case, applies to this claim. Constitutionalization of existing nonconstitutional rules regarding discovery sanctions would be a new rule under *Sawyer*, *Taylor*, and *Branch*.

The sandbagging claim is *Teague*-barred, and it follows that the broader insufficient notice rule would be as well.

IV. Gray's proposed rule does not come close "to the primacy and centrality of *Gideon*."

Little need be said on Gray's claim to the second *Teague* exception. Gray was provided at state expense with two lawyers, not just one, and he does not challenge their effectiveness. He concedes he had no constitutional right to discovery. He does not deny that he failed tc request a lesser remedy than exclusion for the discovery violation. Any rule that would cover this situation is so far below the standard of *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) as to not require discussion.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

March, 1996

Respectfully submitted,

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